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## The Impact of Charity and Tax Law and Regulation on Not-for-Profit News Organizations

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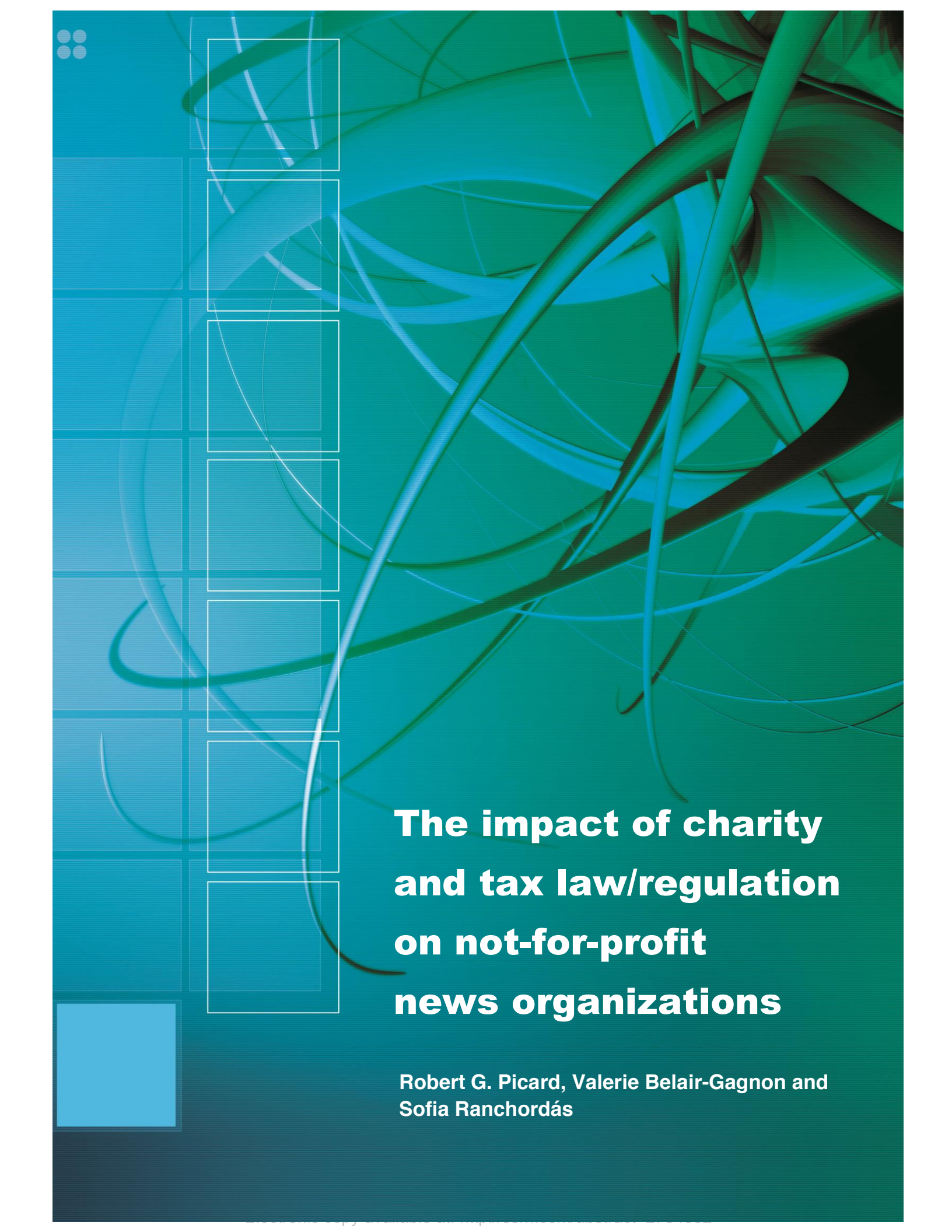
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# **The impact of charity and tax law/regulation on not-for-profit news organizations**

**Robert G. Picard, Valerie Belair-Gagnon and  
Sofia Ranchordás**

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# **The impact of charity and tax law/regulation on not-for-profit news organizations**

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Information Society Project, Yale Law School





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## Executive Summary

Since the advent of the Internet, numerous digital news organizations have had difficulties remaining operational as commercial entities and the number of not-for-profit<sup>1</sup> startups has grown. An important challenge for these news organizations is whether the legal systems in which they operate provide a conducive environment for charitable media and whether it can help explain their development. The legal qualification of news organizations as charities and the conferral of tax-exempt status are necessary to gather the necessary public support for their activities. However, in a number of jurisdictions, non-profit media outlets are often confronted with long-established legal frameworks that do not include journalistic activities within the concept of ‘charitable status’. These news organizations thus face significant delays and uncertainties during the process of obtaining tax-exempt status.

This report contributes to the evolving debate on not-for-profit news start-ups by examining legal systems that determine whether charitable and tax exempt status and a variety of benefits associated with them can be granted. This report compares and contrasts policies, and assesses how such policies affect both the development of startups and existing news organizations that would like to become charities and gain tax-exempt status. It also provides an overview of best regulation practices in an attempt to tackle legal and societal challenges that need to be addressed.

The study draws on the regulatory systems in five countries: Australia, Canada, Ireland, the United Kingdom (England and Wales), and the United States. We selected each of these countries on the basis that they share Anglo-influenced legal traditions. They are nevertheless subject to a mix of federal, state/provincial/territorial, and local regulation. The goal of this report is to gain a better understanding of the legal settings for charitable and tax exempt status for news organizations and challenges that may hinder their development.

Drawing from the national cases, this report finds that not-for-profit media with charitable status exist more in the UK and the US than in Australia. Not-for-profit media entities have not significantly appeared in Canada and Ireland, with the exception of a few media outlets associated with other organizations that have charitable status. The primary hindrances to achieving charitable status for media organizations have been definitional, procedural, political, and commercial. The most significant hindrance has been the legal definitions of charitable purposes and the abilities of media organizations to meet those definitions.

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<sup>1</sup> The term not-for-profit is used to designate enterprises operated for purposes other than providing returns to owners. Not-for-profit organizations can produce profits that are reinvested in the firm. This term *nonprofit* is an older term that sometimes still appears in descriptions of such firms, but is increasingly disused because it incorporates the idea that no profit is or can be generated.

Some charitable/tax exempt news organizations exist in various forms in each country including charity-owned and controlled journalism in which charitable organizations own or control non-charitable journalism-producing organization. The national case studies also show the presence of some hybrid legal structures allowing journalistic-related organizations to receive gifts/grants (e.g. foundations, government aid, and educational structures).

This report summarizes the issues raised by the respective countries to evaluate the potential for not-for-profit news. It also explores how it may be possible for startups and existing news organizations to become charities and gain tax-exempt status. The report concludes that:

- In the last decade, the overall number of not-for-profit media organizations has increased significantly in all countries except Canada and Ireland.
- Not-for-profit media outlets around the world reveal the importance of independent and locally produced media activities that can serve local communities, as they play a central role in global and local media ecosystems.
- While an organization generally must operate on a not-for-profit basis to be able to be qualified as a charity, not all not-for-profit organizations are able to obtain a charitable status and other associated tax exemptions or deductions, gift benefits, postal rate reductions, and other advantages.
- At a time when a number of former for-profit media outlets are leaving the commercial sector and seeking donations and grants, charitable or tax-exempt legal status is essential both for their restructuring and survival.
- The central legal actors in this process tend to be the national tax authorities. However, due to the growing political attention and specificity of the not-for-profit sector, specialized agencies have been recently created in some countries.
- The main challenge for non-for-profits resides in the assessment of the charitable status or eligibility for tax-exempt status.
- Not-for-profit and charitable media organizations which are granted a tax-exempt or a similar preferential tax regime, must operate exclusively or primarily to accomplish one or more charitable or not-for-profit activities or objects.
- A controversial theme in this context has been the connection with political parties or political activities, which is typically limited in the case of not-for-profit organizations and charities.
- The not-for-profit requirement imposed in these countries does not mean that not-for-profit media organizations are entirely precluded from engaging in profitable activities, but limitations may be imposed.
- In general, it is difficult and onerous for a media organization to obtain charitable status.
  - A legal obstacle to obtaining tax exempt status resides in the outdated approach of tax authorities to the not-for-profit sector.

- In general, charities and not-for-profit organizations may receive tax deductible gifts, but some not-for-profits are not eligible to receive tax deductible gifts depending on their charitable status.
- Not-for-profit media outlets which are not allowed to receive tax deductible gifts may find other funding mechanisms such as grants or connections with for-profit organizations.
- Although charitable and tax exempt status may be attractive to some news enterprises, limitations on commercial activities and revenue, prohibitions on political activities, and other constraints may make them undesirable for some organizations.

Charitable and tax exempt status issues become increasingly important in the coming years and news organizations will need to be attuned to the regulatory developments surrounding them. Start-ups and established news organizations will need to decide whether it is feasible and desirable to become not-for-profit and to seek charitable status, how they may do it, and how it may affect the development of their organization and news output.



## Section 1: Increasing interest in law and regulation involving not-for-profit news media

In recent years, not-for-profit media organizations have become a common response to changes in the mode of funding tied to the digital shift and the financial challenges faced by legacy journalistic organizations. This phenomenon has been particularly visible in the United States, where the largest charitable and philanthropic sectors exist. However, this business model has spread to other countries and not-for-profit media are now found in many nations.<sup>2</sup> The pattern of development has been uneven.

A fundamental issue surrounding not-for-profit startups is whether news organizations can legally be classified as charities and enjoy tax-exempt status, guaranteeing the public support of their activities. The current construction and traditional application of charity and tax regulations have been blamed for delaying the development of such organizations.<sup>3</sup> To illustrate, traditional not-for-profit and tax laws have limited the list of cultural and educational activities that are eligible for a tax exempt status. Furthermore, this tax exempt status limits the extent to which not-for-profit organizations can rely on advertisement in some locations. For the media industry, it has proven to be almost impossible for many digital news providers to remain operational without this status since the advent of the Internet. The relevant legal framework for not-for-profit media namely at the newsgathering and distribution levels, include not-for-profit and tax law, subsidies and recent changes to copyright, and competition laws.<sup>4</sup>

The number of not-for-profit startups has grown in the last decade. Most of these new entrants have been funded by foundations, readers, and community organizations.<sup>5</sup> Not-for-profit startups are typically small and focused on special

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<sup>2</sup> Knight Foundation, *Finding a Foothold: How Nonprofit News Ventures seek Sustainability*. Miami, Knight Foundation, 2013; Nicola Bruno and Rasmus Nielsen, *Survival is Success: Journalistic Online Start-ups in Western Europe*, RISJ Challenges Series, Reuters Institute for the study of Journalism, University of Oxford, 2012; Esa Sirkkunen and Clare Cook, eds. *Chasing Sustainability on the Net*. Tampere, Finland: Tampere Research Centre for Journalism, Media and Communication, University of Tampere, 2012; Miquel Carvajal, Joséa García-Avilés, and, José González, *Crowdfunding and non-profit media: The emergence of new models for public interest journalism*, *Journalism Practice*, 2012, p.1-10.

<sup>3</sup> Nikki Usher and Michelle Layser, *The Quest to Save Journalism: A Legal Analysis of New Models for Newspapers from Nonprofit Tax-Exempt Organizations to L3Cs*, 2010 *Utah L. Rev.* 1315, 2010; Levy, David A. L. and Robert G. Picard, eds. *Is there a Better Structure for News Providers? The Potential in Charitable and Trust Ownership*. Oxford: Reuters Institute for the Study of Journalism, University of Oxford, 2011.

<sup>4</sup> Nick Gamse. Legal Remedies for Saving Public Interest Journalism in America, *Northwestern University Law Review*, Vol. 105, No. 1, 2011; Bruce Sanford, Bruce Brown, and Laurie Babinski, *Saving Journalism with Copyright Reform and the Doctrine of Hot News*, 26 *Communications Lawyer* 8, 2008-2009; Brad A. Greenberg. A Public Press? Evaluating the Viability of Government Subsidies for the Newspaper Industry, *UCLA Entertainment Law Review*, Vol. 19, p.189, 2012.

<sup>5</sup> David Westphal, The state of independent local online news: Start-ups look for foundation support, *Online Journalism Review*, Nov. 3, 2008, <http://www.ojr.org/ojr/people/davidwestphal/200811/1568/>; Jan Schaffer, *New Voices: What Works*. J-Lab: The Institute for Interactive Journalism. 2010, <http://www.kcnn.org/WhatWorks/introduction>.

topics or geographical niches, such as investigative and environmental journalism or local communities.<sup>6</sup> These startups do not compete directly with established players.<sup>7</sup>

Not-for-profit media face a number of business and managerial challenges, including the difficulty to obtain capital, few incentives for better performance, tendencies to operate with a short-term mentality, and governance problems.<sup>8</sup> Startup news sites tend to be affected by pre-existing expectations and organizational objectives based on the past experiences of their founders with other commercial and not-for-profit endeavors and these affect the development and ability of the firms to adapt and sustain themselves.<sup>9</sup>

Scholars have studied not-for-profit media organizations in the United States and the United Kingdom. Usher and Layser found that tax exemption alone is unlikely to provide value to newspapers because “most do not pay tax anyway due to their continuing operating losses”.<sup>10</sup> In 2013, the Pew Research Center published a report on not-for-profit news business structures, raising doubts about the long-term financial well-being of those organizations.<sup>11</sup>

The business and sustainability issues have effects once not-for-profit media are established, but the fundamental issues are whether the legal systems in which they might operate provide a conducive environment for such charitable media and can explain their varying development. The existence of not-for-profit media is more usual in some countries and such media have longer histories in some countries than others. It has been suggested that varying national requirements for achieving government recognition and benefits of not-for-profit operation may influence the development of such media.<sup>12</sup> The existing scholarship on not-for-profit media has not addressed the similarities and differences in countries with similar legal systems (i.e., common law). We are thus left with an insufficient analysis of the conditions that foster state media business systems and the best practices for not-for-profit media.

To help address that deficiency, this report compares and contrasts not-for-profit legal systems in five countries that share Anglo-influenced legal traditions: Australia, Canada, Ireland, the United Kingdom (England and Wales), and the United States. This report compares policies, identifies similarities and differences, and assesses how policies affect development of startups and existing

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<sup>6</sup> Bruno and Nielsen, 2012, op cit.

<sup>7</sup> Sirkkunen and Cook, 2012, op cit.

<sup>8</sup> Robert G. Picard and Aldo van Weezel, Capital and Control: Consequences of Different Forms of Newspaper Ownership, *International Journal on Media Management*, 10(1):22-31, 2008.

<sup>9</sup> Lucia Naldi and Robert G. Picard. ‘Let’s Start an Online News site’: Opportunities, Resources, Strategy, and Formational Myopia in Startups”, *Journal of Media Business Studies*, 9(4):47-59, 2012.

<sup>10</sup> Nikki Usher and Michelle Layser, 2010, op cit.

<sup>11</sup> Pew Center, Taking Care of Business: A Catch-22, June 10, 2013, [http://www.journalism.org/2013/06/10/taking-care-business-catch22/?beta=true&utm\\_expId=53098246-2.Lly4CFSVQG2lphsg-KopIg.1](http://www.journalism.org/2013/06/10/taking-care-business-catch22/?beta=true&utm_expId=53098246-2.Lly4CFSVQG2lphsg-KopIg.1)

<sup>12</sup> Levy and Picard, 2011, op cit.

news companies that would like to be charities and have tax-exempt states. It also identifies best practices in regulation and challenges that needs to be addressed. In all cases under scrutiny in this report, not-for-profit organizations and charities are subject to a mix of federal, state/provincial and territorial regulation depending upon the structure of a country. While the general approach to becoming a not-for-profit entity are similar in each country, there are significant variations from one jurisdiction to another.

The range of benefits associated with a governmental designation as a charitable organization or one with tax exempt status, also come with some restraints. These include limitations on whether, or the extent to which, they may engage in commercial activities and engage in advocacy in political settings. These restrictions vary in different jurisdictions.

Although all the countries share an Anglo legal tradition, the researchers recognize there are differences amongst the countries in terms of physical and population sizes, structures of government, legal competencies of national government and provinces/states/devolved nations, the sizes of government and regulatory agencies, the structures of media systems and the number of media units, and the types and amount of not-for-profit media already present.

These differences, as well as differences in approaches to charity and tax laws, influence the extent to which not-for-profit media are present, the impetus to create and support additional not-for-profit media, and efforts to alter existing charity and tax measures affecting not-for-profit media.

## Methods

The framework of this project was designed jointly by researchers at the Reuters Institute and the Information Society Project. A research team of legal and policy scholars and researchers in the 5 countries was assembled to study the policy and legal bases of charitable and tax status of not-for-profit organizations, processes for obtaining the status, and to explore their application and implications of media enterprises in the individual countries.

A written description of the research was produced and amended in the course of telephone conferences and e-mail discussions among the full research team about the issues and how to address them. This produced mutual understanding of the task and a common set of questions about the issues to be applied in each country.

Researchers in each country addressed the following questions about each of the five countries:

1. What charity and tax laws and regulations govern the granting of charitable status?
2. Do charities/tax laws and regulation permit news organizations to be charities/tax exempt organizations that can receive tax-deductible gifts?

3. What is the rationale for or against such designation?
4. Do any procedural hindrances exist?
5. Are there charitable/tax exempt news organizations in the country?
6. Are there news organizations that are not charities or tax exempt that are able to receive gifts/grants through some other structures or means?
7. Have recent efforts been made to permit newspapers, digital media, and other media to become charities? By whom? With what outcomes?
8. What do tax authorities, parliamentarians/legislators, and media personnel think about charitable status for news organizations?
9. How does the presence or lack of charitable status affect the development of not-for-profit news organizations?

Authors of the national reports were permitted to expand upon these issues and deal with the issues in slightly different manners where conditions differed and it was necessary to provide a fuller understanding of the legal and regulatory issues. The cross-national comparison (Section III) is based on the common analysis.

The conditions and extent of development of charity and related tax laws and the presence and support for not-for-profit media was expected to produce difference in the size of answers to these questions and the overall country reports. Countries such as the US and UK, for example, have more well developed charities law and decisions than other countries and more experience with not-for-profit media so they can be expected to provide more extensive answers to the questions. Despite those developments, there is little movement toward altering the law in the US or UK to specifically recognize journalism as a charitable purpose and most journalism organizations desiring the status are structuring themselves in organizations designed to pursue purposes currently recognized for charitable status and then engaging in media activities to fulfil these purposes. Conversely, countries such as Canada and Ireland might be expected to produce more limited responses.

Following completion of the national chapters, a cross case comparison of the five countries was produced and conclusions developed by the research team.

## Terminology

Discussions of issues surrounding not-for-profit media are often hampered because of differences in understanding of terms and definitional issues surrounding them. Three major concepts are critical to understanding the policy and legal debates and issues.

A *not-for-profit firm* is operated for purposes other than generating financial return for owners, so it is not “owned” by individuals but typically structured as an association or similar entity governed by a board made up of persons who don’t own the firm. This type of firm may or may not operate in a commercial manner and may or may not generate profit (money remaining after costs of operation are subtracted from income). Any profits generated in such operations



are reinvested in the enterprise. A not-for-profit firm is subject to income taxes, business taxes, and other business regulation.

A *charity* is an organization designed to produce public benefits whose purposes meet specifications under law and meets requirements detailed in charity law. Charitable status confers benefits on the organization. These vary depending upon jurisdiction, but can include income tax, value added tax, and sales tax reductions or exemptions and other benefits such postal rate advantages. Organizations must seek charitable status through application to the governmental agency specified to grant such status.

An organization with *tax-deductible gift status* may receive donations and gifts from individuals and other enterprises and those benefit by being able to deduct the gifts from their tax returns, thus receiving a governmental reward for supporting organizations that support public purposes and making support of the enterprise more attractive. Depending upon the jurisdiction, this status may or may not be granted concurrently with charitable status and may involving separate applications and determinations by additional government agencies.

The intent is to gain a better understanding of the legal settings for charitable and tax exempt status for news enterprises and impediments that may hinder their development.



## Section II: National Studies

### Australia: Impact of Charity and Tax Law/Regulation on Not-for-Profit News Organizations

Franco Papandrea<sup>13</sup>

University of Canberra, Australia

#### 1. Introduction

Australia has highly commercial print and broadcast media, public broadcasting, and some not-for-profit media operations. Although there is growing interest in charitable operation of news enterprises, media receive no special treatment and must meet requirements established for such organizations by national and state/territorial authorities.

Historically, media operated by religious organizations, community broadcasters, and education and welfare services have been recognized as meeting charitable standards. More recently some media associated with educational and scientific institutions have also been granted deductible gift recipient (DGR) status, the most notable being *The Conversation*—which has now expanded internationally.

Taxation treatment of charities and not-for-profit organizations has attracted significant political attention over the past 15 years. Considerations of several public inquiries commissioned by different governments over that period eventually led to the establishment of a national regulatory authority — the Australian Charities and Not-for-profits Commission (ACNC) in 2012 — and the enactment of the *Charities Act 2013*. The new legislation provided a legal definition of charitable purposes, which opened the possibility of not-for-profit news organizations qualifying for charitable status.

However, registration as a charity does not automatically confer tax-deductibility for gifts or donations received. That coveted privilege is restricted to organizations executing specific categories of public benefit activities such as health, education and welfare that have been endorsed by the Australian Tax Office. Consequently, only a small handful of not-for-profit news organizations are able to attract tax-deductible donations directly or indirectly via a relationship with a DGR organization.

Inability to register as a charity or to offer tax deductibility for donations does not appear to have inhibited investment in new news organization ventures. In the wake of the 2008 global financial crisis, there were several calls for the provision of tax assistance to news organizations by journalism academics and interests associated with some emerging news ventures. However, legacy media organizations were opposed to tax assistance and independent considerations

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<sup>13</sup> Research assistance by Louise Pemble is gratefully acknowledged.

concluded that it was not warranted.<sup>14</sup> Currently, the predominant view among policy makers seems to be that Australia is well served by a diverse and growing number of news organizations and consequently there is no immediate need for tax concessions or other assistance to promote their further development.

## **2. Charity and tax laws and regulations governing charitable status**

Not-for-profit organizations performing public benefit activities solely for charitable purposes may be eligible to register as a charity and obtain a range of taxation and other concessions from Commonwealth and State/Territory governments.

Australia is a federation of six States and three self-governing Territories all of which have their own constitutions, parliaments, governments, and laws. Not-for-profit organizations and charities are subject to a mix of Commonwealth (federal) and State/Territory laws and regulations.

Incorporation of a not-for-profit organization generally occurs under the legislative framework of the State/Territory of residence. While the requirements are similar, there are variations from one jurisdiction to another.

Charities are primarily governed by Commonwealth legislation and regulations, which define the status of a charity and its access to tax concessions. Some of the operational aspects of charities, such as fundraising activities are also subject to State/Territory laws and regulations. A charity is broadly defined as a not-for-profit organization carrying out a charitable purpose.

A not-for-profit organization is defined as an entity undertaking activities that are not for the profit or personal gain of its members and whose governing charter prohibits distribution of profits or assets to them including when the entity is wound up. Any profits generated by the organization's operations must be retained by the entity and be applied to carrying out of its purposes.

Not-for-profit organizations operate in many areas of Australian society including:

- church schools
- churches
- community child care centers
- cultural societies
- environmental protection societies
- neighborhood associations
- public museums and libraries
- scholarship funds
- scientific societies
- scouts
- sports clubs

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<sup>14</sup> The issue was considered by the Independent Inquiry into Media and Media Regulation in 2011-12.

- surf lifesaving clubs
- traditional service clubs

Not-for-profit status is a prerequisite for registration as a charity. To be registered as a charity, a not-for-profit organization must demonstrate that all its activities are in pursuit of charitable purposes as defined in the relevant legislation and for the benefit of the public.

Until the enactment of the *Charities Act 2013* (Cth) the meaning of charity and charitable purpose were determined on the basis of accumulated common law principles. While preserving those principles, the *Charities Act* introduced statutory definitions to provide greater clarity and certainty.

The legislation identifies twelve charitable purposes:

1. advancing health
2. advancing education
3. advancing social or public welfare
4. advancing religion
5. advancing culture
6. promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia
7. promoting or protecting human rights
8. advancing the security or safety of Australia or the Australian public
9. preventing or relieving the suffering of animals
10. advancing the natural environment
11. promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a state, a territory or another country, (where that change furthers or opposes one or more of the purposes above) and
12. other similar purposes 'beneficial to the general public.'

The law requires all of an organization's purposes to be charitable, except for purposes that are "incidental or ancillary to" the charitable purposes. Organizations undertaking non-charitable purposes, which do not demonstrably further their charitable purposes, are unlikely to satisfy the criteria for registration as a charity. Not-for-profit organizations unlikely to fit the legal meaning of charitable purpose include:

- social club — unless its main purpose is charitable such as to help people who are socially isolated or disadvantaged, and the club's social activities are the way it achieves this purpose;
- sporting and recreational organization — unless its main purpose is charitable such as providing sporting activities for the people with disabilities or the elderly; and
- professional or trade group — unless its main purpose is charitable, such as advancing education.

To be a charity, an entity's purpose must be for the public benefit and the derived benefits must be broadly available to a sufficient section of the public. A sufficient section of the public may be, for example, a local community, followers of a particular religion, people with a particular disability, refugees or young people.<sup>15</sup>

The benefit to the public may accrue in a range of ways including the provision of goods, services, education, counseling, spiritual guidance, or improvements to the environment. In the absence of contrary evidence, purposes such as advancing education, relieving poverty, and advancing religion are also presumed to be for the public benefit.

For organizations that satisfy the eligibility criteria, the process to obtain charitable status is straightforward and not financially onerous. Once registered as a charity, an organization must comply with charity specific obligations including governance standards, financial reporting and recording standards, and provide an annual information statement to the charities regulator, the Australian Charities and Not-for-profits Commission (ACNC).

Until the establishment of the ACNC and the enactment of the *Charities Act 2013*, news organizations were generally unable to qualify for charitable status because of a precedent established by a 1934 High Court judgement [*Roman Catholic Archbishop of Melbourne v. Lawler*], which ruled that a newspaper was not a charitable object. Although some newspapers have since then attained listing as a charity, to be eligible for charitable status news organizations must be able to demonstrate that all their activities fall within the charitable purposes listed in the *Charities Act 2013*.

While registration as charity entitles an entity to a range of taxation and other concessions from Commonwealth and State/Territory governments, charitable status *per se* is not sufficient to enable donors to claim income tax deduction for donations or gifts made to a charity. *Income tax deductibility* is available only for gifts or donations to charities and other organizations, which have been accorded deductible gift recipient (DGR) status by the Australian Tax Office (ATO) or in the *Income Tax Act*.

### **3. Tax concessions for charities and not-for profit organizations**

Registered charities and not-for-profit associations such as sports clubs, community service groups, and cultural and educational associations, are eligible for a range of tax and other concessions from the ATO. Charities may also be eligible for additional concessions from relevant state and territory governments.

All charities that register with the ACNC can apply for the following tax concessions:

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<sup>15</sup> Australian Charities and Not-for-profits Commission (ACNC), [https://www.acnc.gov.au/ACNC/Register\\_my\\_charity/Who\\_can\\_register/Public\\_benefit/ACNC/Reg/Public\\_benefit.aspx?hkey=04210009-a93a-4639-9d44-023914e971ff](https://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/Public_benefit/ACNC/Reg/Public_benefit.aspx?hkey=04210009-a93a-4639-9d44-023914e971ff).

### *Income tax exemptions and franking credits*

All charities registered with the ACNC may apply to the Australian Tax Office for endorsement as an income tax exempt organization. The exemption applies to all the income, including donations, received by a registered charity. Eligible not-for-profit organizations receive a similar exemption only for income generated from their members or from services supplied to their members.

Charities endorsed by the ATO as exempt from income tax are also eligible to receive refunds of franking credits (the amount of tax paid already paid by a corporation) of dividends earned by stockholders.

### Goods and services tax concessions

Goods and services tax (GST) is a tax on transactions. Where goods and services are sold, the amount received for the sale may be subject to GST. Similarly, where goods and services are purchased, the purchaser may be able to claim a GST credit for the GST included in the amount paid.

Individuals or businesses involved in the sale of goods or services with a turnover of less than AUD 75,000 per annum are not required to register for GST and do pay the tax on their sales nor claim GST credit on their business purchases. The GST registration threshold for not-for-profit organizations and charities is AUD 150,000. Charities with a turnover above the threshold above the GST registration threshold may apply to for a number of GST concessions provided they are registered with the ACNC. Voluntary gifts/donations received by registered charities and not-for-profit organizations are not subject to GST, but may be subject to income tax.

### Fringe benefits tax rebates

Fringe benefits tax (FBT) is a tax paid on any benefits that an employer provides to their employees outside their salary or their superannuation, such as the use of a work car, phone or any other benefit. A registered charity may apply for the FBT rebate (capped at \$30,000).

### Tax concessions by state, territory and local governments

A charity does not need to be registered with the ACNC to receive state and territory or local (municipal) government tax concessions. These concessions may apply to taxes such as stamp duty (a tax on some financial and property transactions), payroll tax (a tax on total wages paid by employers in excess of the stipulated threshold) and land tax (a tax on landowners).

The type and level of concession available and their eligibility requirements can vary from jurisdiction to jurisdiction. Some local governments may provide charities with concessions on local taxes and charges payable for municipal services.

Public fundraising activities are subject to related State/Territories laws and regulations, which contain some concessions for charities and not-for-profit organizations.

#### **4. Tax-deductible gift recipient status**

While charities are able to receive gifts and donations, donors may claim a tax deduction only for gifts and donations that are made to DGR entities. Not all charities qualify for DGR tax status.

An entity will have DGR status if it is so listed by name in the *Income Tax Act* or if it falls within one of the general categories of DGR listed in the legislation and is so endorsed by the ATO. The legislation also sets out the eligibility criteria, which need to be satisfied to secure endorsement. Securing DGR listing by name is a difficult and prolonged process because it requires the Parliament to pass an amendment to Income Tax Act and is consequently relatively uncommon.

The general DGR categories include:

- health (including public hospitals, public authorities for disease research, health promotion charities, public ambulance services and public funds for ambulance services);
- education (including public universities and public funds therefor, higher education institutions, residential education institutions, technical and further education institutions, public fund for religious education in schools, scholarship funds);
- research (approved research institutes);
- welfare and rights (including registered public benevolent institutions and public funds therefore, public funds for the relief of needy persons, disaster relief funds, animal welfare charities, and charitable services institutions);
- defense (including public institutions or funds for members of the armed forces and public funds for reconstruction or repair of a war memorial);
- environment (public funds on the Register of Environmental Organizations);
- the family (public funds by registered charities for an approved marriage guidance organization or for the provision of family council or family dispute resolution);
- international affairs (overseas aid funds and disaster relief funds);
- sports and recreation (Girl Guides Australia and Scout Association of Australia);
- cultural organizations (public funds on the Register of Cultural Organizations, and public libraries, museums and art galleries);
- fire and emergency services; and
- ancillary funds (public or private trusts established solely for the purpose of providing benefits to DGRs).



Organizations undertaking activities falling within a general DGR category may be eligible to obtain part-endorsement exclusively for those activities. This type of GDR endorsement requires the establishment of a gift funds specifically for the endorsed activities. Options, which may be used to comply with part-endorsement requirements, include:

- establishment of a separate fund authority or institution to undertake the eligible activities;
- setting up a new separate organization whose sole purpose is to undertake the eligible activities;
- making and agreement with an existing DGR charitable foundation to establish a sub-fund or a special account in support of the eligible activities; or
- creating a project as part of an *auspice* agreement with an organization with appropriate DGR endorsement who will be responsible for the collection of related donations, their administration and their statutory reporting obligations.

The above options involve an increasing level of administrative complexity and related difficulties.

An organization endorsed as a DGR as a whole may, but need not, maintain a separate gift fund for particular activities undertaken under the provisions of its charter. For example, a public university does not need to operate a gift fund for a library open to the public.

The eligibility criteria for DGR status do not fit well with the purpose and functions of news organizations. As discussed below, they face significant difficulty in securing charitable status and obtaining DGR status is many-fold more difficult. Although there are some recent examples of news organizations securing DGR concessions in unusual circumstances, in the main the eligibility criteria pose seemingly challenging obstacles. Table 1 provides a summary of tax concessions available to not-for-profit organizations, charities and DGR organizations.

## 5. News organizations and charities/tax laws

News organizations do not enjoy any special treatment under Australian charities and tax laws. Non-profit organizations pursuing any of the twelve charitable purposes defined by the *Charities Act 2013* are eligible to be registered as a charity and access related tax concessions.

Traditional news organizations, such as newspapers, would not normally be considered as having a charitable purpose. Indeed a longstanding precedent in Australian case law established that a bequest for the establishment of a Catholic newspaper was not a charitable gift notwithstanding the newspaper was to be produced by a charitable institution [*The Roman Catholic Archbishop of Melbourne v. Lawler and Ors* (1934) 51 CLR 1]. A central element of the

decision was that: “The notion of a daily newspaper necessarily carries with it the conduct of a business enterprise which could not ignore the temporal necessity of recovering outlay by revenue.”

In a more recent taxation ruling, the ATO (2011) noted: “this was not to say, of course, that no newspaper could be religious and charitable. Rather, in the case

Table 1: Summary of tax concessions and types of non-profit organizations

<b>Types of Tax concessions</b>	<b>Types of not-for-profit organizations</b>		
	<b>Registered public benevolent institutions &amp; Registered health promotion charities</b>	<b>Registered charities</b>	<b>Other non-profit organizations</b>
Income tax exemption	(1)	(1)	Certain types only (2)
FBT exemption (subject to capping threshold)	(1)	(1)	Certain types only (3)
FBT rebate		(8)	Certain types only (4)
GST concessions for charities and gift deductible entities	(1)	(1)	Certain types only (5)
GST concessions for non-profit organizations			
Deductible gift recipients	(6)	Certain types only (6)	Certain types only (6)
Refunds of franking credits	(7)	(7)	Certain types only (7)

Source: ATO, ‘Tax concessions - an overview - Tax basics for non-profit organizations’, <https://www.ato.gov.au/Non-profit/Getting-started-for-non-profit-organizations/In-detail/Tax-concessions/Getting-started/Tax-concessions---an-overview---Tax-basics-for-non-profit-organizations/#>

Notes:

1. The organization must be endorsed by us to access this concession.
2. Only certain types of non-profit organizations are exempt from income tax. Many non-profit organizations are taxable, but may be entitled to special rules for calculating taxable income, lodging income tax returns and special rates of tax.
3. Public and non-for-profit hospitals and public ambulance services are eligible for this concession.
4. Certain non-government non-profit organizations are eligible for this concession.
5. The organization must be a deductible gift recipient to access this concession.
6. The organization must be endorsed by us as a deductible gift recipient to access this concession. The only organizations that do not need to be endorsed are those listed by name in tax law.
7. The organization must be an entity that is endorsed by us as exempt from income tax or a deductible gift recipient to access this concession.
8. The organization must be endorsed by us to access this concession. Not all registered charities are eligible for this concession.

there was no evidence that the proposed newspaper was to advance religion.”<sup>16</sup> In other words, while the provision of news *per se* is not a charitable purpose as defined by the *Charities Act*, it is altogether possible that it may be provided to advance or further a charitable purpose. Whether it actually does so is a matter to be determined by the merits of individual cases.

In 2012, the establishment of ACNC as the independent national regulator of charities coincides with what appears to be a somewhat less stringent interpretation of the legal meaning of 'charity' in the charities registration process. Some recent registrations of existing newspapers not previously recognized as charities suggest that the furthering of charitable purpose such as advancing religion, education, culture, science or similar purposes beneficial to the public were given additional weight in the decision.

For example, in December 2012, two newspapers published by the Catholic Church, *The Catholic Weekly* (Sydney) and *The Record* (Perth) were registered as charities. Some secular community newspapers published in local districts including the *Community Spirit Newspaper* and the *Newman Community Newspaper* (respectively in Ravensthorpe and Newman in Western Australia), and the *Churchill & District News* in Victoria were also then able to register as charities.

At about the same time *The Epoch Times*, a newspaper claiming national coverage, was also registered as a charity (see text-box below). This latter newspaper claims to have been the first to have been recognized as a charity by the ATO. It was endorsed as a charity under the category “other charitable purpose beneficial to the community.”

As registered charities, while these newspapers are exempt from payment of income tax and receive the applicable GST and FBT concessions, none of them has received ATO endorsement as a deductible gift recipient (DGR).

## **6. News organizations with access to tax deductible donations**

Although several news organizations in Australia solicit financial donations from supporters, a very small number is able to offer donors income tax deductibility for donations received. In some cases, the income tax deductibility is provided indirectly by an associated entity.

The *Bundaberg Talking Newspaper Association* provides a news service to vision impaired residents in its region (Bundaberg, Qld). Established in 1988, the association’s service involves the recording and distribution of oral tapes of news stories and events covered by the local daily newspaper, the *Bundaberg News-Mail*.<sup>17</sup> The association is a registered charity (category: public benevolent institution) and has had DGR since 1 July 2000.

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<sup>16</sup> Australian Taxation Office, “Taxation Ruling, Income tax and fringe benefits tax: charities”, TR 2011/4, ATO, Canberra.

<sup>17</sup> M. Derry, Talking paper celebrates major milestone, *The Gympie Times*, 14 January 2014.

## Melbourne Epoch Times Becomes First Charitable Newspaper in Australia

By Julia Huang

December 5, 2012

The Melbourne edition of *The Epoch Times* is now Australia's first charitable newspaper, after endorsement as a charitable institution by the Australian Taxation Office (ATO).

The ATO's endorsement of *The Epoch Times* is the first of its kind in Australia. A not-for-profit newspaper would not generally fall under the Australian legal definition of charitable, after a 1934 High court case—*Roman Catholic Archbishop of Melbourne v. Lawler*—found that a newspaper is not a charitable object.

"I believe achieving the status of a charitable institution, despite a precedent that has existed in Australia for almost 80 years, clearly demonstrates that the Australian Taxation Office understands how critical *The Epoch Times* is as a global news media," said Thomas Houston, CEO of *The Epoch Times International Inc.*

The ATO found *The Epoch Times* to be a charitable organization after reviewing the founding purposes of the newspaper—to fill the void of truthful news coverage of events in China and to report on matters of public interest from around the world.

*The Epoch Times* was the first newspaper to report widely on issues including the SARS epidemic, the melamine milk scandal, and the Chinese Communist regime's abuses against members of the Falun Gong spiritual group, after Chinese media censors stifled these stories within China.

In Australia, *The Epoch Times* has reported on issues of national concern, including the Chinese regime's overseas spy networks, the controversial Confucius Institutes language program, and unethical business practices by Chinese companies in Australia.

Organizations like the Public Interest Journalism Foundation (PIJF) have called on the Federal Government to introduce tax deductibility for donations to not-for-profit media groups producing quality journalism in the public interest.

Source:<http://www.theepochtimes.com/n2/australia/melbourne-epoch-times-becomes-first-charitable-newspaper-in-australia-322082.html>

The more recently established *The Conversation* sees itself as an independent voice of trusted information from the university and research sector, acting in the public interest without commercial or ideological considerations. Written by acknowledged experts in collaboration with professional editors, it is made freely available to the widest possible audience through its own platform and Creative Commons publishing.

According to *The Conversation's* management, "The Conversation was inspired by a radical thought: why not work with the university and research sector, with its vast access to expertise and knowledge, to create a giant newsroom with the

very best specialist writers.”<sup>18</sup> The organization’s long-term goal is “to create a global network of trusted content that draws on the expertise of academics and researchers worldwide to inform public debate, explain complex problems and collaborate on developing solutions.”

The Conversation was launched as an independent not-for-profit news organization in March 2011 with funding support from university and research institutions,<sup>19</sup> state and federal government and business enterprises. Its ongoing revenue streams include annual membership fees paid by universities and research institutions, paid advertisements on its ‘jobs board’ and license fees from international versions.

Since its launch, The Conversation has become Australia’s leading independent source of news, analysis and commentary website with over 2.5 million unique visitors each month and 22 million via Creative Commons republishing. The Conversation is headquartered in Melbourne and its technology and publishing platform supports regional bases in London, Boston, Johannesburg and Paris.

The Conversation provides an independent source of news and views from the academic and research community, curated by a team of professional editors and delivered free of charge direct to the public. Authors are allowed to write only on subjects they have proven expertise in, which they must disclose together with potential conflicts of interest alongside their article.

The Conversation covers a very broad range of academic disciplines with sections for Arts & Culture, Education, Politics & Society, Business & Economy, Environment & Energy, Health & Medicine and Science & Technology. There is a strong emphasis on social and physical sciences

The operating company, Conversation Media Group was established by the ‘Conversation Trust’ which acquired DGR status in November 2012 via an amendment to the *Income Tax Act 1997* to list it as such ‘by name’ in the legislation. Supporters are thus eligible to claim a tax deduction on their donations to the Trust. The process followed to secure DGR status is detailed below.

Following the loss of government funding support in early 2015, the Conversation has been appealing to readers and members for tax-deductible donations, apparently with some success.

Some news organizations receive tax-deductible donations indirectly via a parent or associated organization with DGR status.

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<sup>18</sup> Correspondence with Lisa Watts, Chief Operating Officer, *The Conversation*.

<sup>19</sup> The founders were CSIRO, University of Melbourne, Monash University, University of Technology Sydney, and University of Western Australia.

## Securing Deductible Gift Recipient status for *The Conversation*

*The Conversation* (TC) is an independent not-for-profit institution which seeks to make academic and research expertise available to the public in order to promote deeper understanding and discussion of complex issues.

Some seven months after its launch TC embarked on securing Charity and Deductible Gift Recipient (DGR) status to improve its access to funding support from public foundations and wealthy philanthropists which traditionally donated mainly to DGR charitable institutions. Lack of charity and DGR status would also have frustrated TC's plan to offer readers the opportunity to support its work in a 'crowd funding' like arrangement.

Charity status had been traditionally confined to institutions that were established and run to advance or promote charitable purposes. In the field of education and information, charitable status was generally restricted to public universities and research institutes.

However, there were some recent precedents of DGR status being accorded to like institutions:

- Royal Institution of Australia is an organization promoting public awareness and understanding of science. Its activities include the distribution of a news feed 'a week in science' via social media websites of other media organizations. It was listed as a DGR entity in the *Income Tax Act 1997* on 16 April, 2009 and was subsequently registered as a charity on 3 December, 2012.
- Grattan Institute is an independent 'public policy' think tank which seeks to foster informed public debate on the key policy issues for Australia. It was recognized as a charitable institution on 25 November 2008 and was listed in the legislation as a DGR on 5 March 2009.

Based on these precedents TC sought DGR classification under 'Education' or 'Research' using a 'level playing field' argument to justify a review of its status. As TC was not otherwise eligible for DGR status, it sought grant of such status via a parliamentary amendment of the legislation to be included in the list of 'named' DGR entities in Division 30 of *Income Tax Act 1997*. The submission to the Commonwealth Treasurer was followed by months of extensive lobbying of the treasury by TC's Board and network of supporters. Eventually, after some months, the submission and lobbying bore fruit and TC was granted DGR status on 22 November 2012 and was soon after recognized as a charitable institution under the 'advancing education' category on 3 December 2012.

TC suspects its submission to Treasury was unlikely to have been successful had it "been positioned as a media company rather than a research outcome disseminator and knowledge platform". As a collaboration between editors and academics to provide informed news analysis and commentary, TC considers itself a knowledge sharing platform that is vital for a well-informed democracy rather than as a media project.

The Australian philanthropic sector is not well developed and apart from the Myer and the Ian Potter Foundations, most foundations prefer very 'hands-on' projects directly targeting the disadvantaged. As the sector matures it is possible foundation investments may become more strategic. To attract support from foundations, new non-profit media startups need to be unique, ambitious and entrepreneurial and they need to demonstrate a clear pathway to sustainability – not easily done. Few foundations anywhere in the world are likely to support media project relying entirely philanthropic funding.

In a small market like Australia, non-profit media entities are rarely of a scale sufficient to build a sustainable business model on support from foundations. Half of TC's revenue comes from annual membership fees paid by universities and research institutes. TC also generates some revenue from its 'jobs board' advertisements and project based funding from government and corporations,

and is working hard on new revenue streams.

Online advertising is less attractive than ever before with much branded content and native advertising unlikely to be pursued primarily for the public good.

Source: Correspondence with Lisa Watts, Chief Operating Officer, *The Conversation*

*Inside Story* ([insidestory.org.au](http://insidestory.org.au)) is an independent news service distributed by email to subscribers free of charge. The Swinburne Institute for Social Research of Swinburne University of Technology published the website. It specializes on investigation of the forces shaping politics, society and culture and draws on a network of Australian writers, journalists and academic researchers to publish detailed related essays, articles and commentary. While the Swinburne University of Technology primarily funds *Inside Story*, the organization encourages donations from subscribers and the general public. To achieve income tax deductibility for donors, the donations are collected by the university, which enjoys DGR status by virtue of being a public educational institution.

*Eureka Street* ([www.eurekastreet.com.au](http://www.eurekastreet.com.au)), formerly a monthly print magazine, is also an online journal of analysis and commentary on current political, religious and cultural issues. The Australian Jesuits publish the magazine. According to *Eureka Street* website, it is “as a peer of such publications as *Crikey*, *The Age/Sydney Morning Herald* and the ABC’s online publications, albeit offering a distinctively Christian values-based alternative to these secular publications.”<sup>20</sup> Access is free but regular readers are encouraged to support it by making tax-deductible donations to the Australian Jesuit Foundation.

The *ScienceNetwork Western Australia* (SNWA) ([www.sciencewa.net.au](http://www.sciencewa.net.au)) is another example of indirect access to funding from taxable deductible donations. SNWA is an online science news website highlighting Western Australia’s achievements in science and technology maintained by Scitech Discovery Centre, a Perth-based science and technology centre (interactive museum) supported by the WA Government’s Office of Science. Scitech Discovery Centre has been endorsed as DGR entity by the ATO since 1 July 2000 and was subsequently registered as charity (3 December 2012). The news items are sourced from freelance writers who submit copy to in-house editors.

The *Royal Institution of Australia* (RiAus) similarly promotes public awareness and understanding of science in Australia generally (<http://riaus.org.au/about-riaus/>). It publishes a weekly news service, *A Week in Science*, which according to its website is available on YouTube, Vimeo, iTunes and SoundCloud, and also appears on the Community Radio Network, ScienceAlert, selected News Corporation websites, Cosmos Magazine, Skeptic Zone Podcast, Nambucca Valley Radio 105.9FM, Sustainability TV, Skep.tv, and Rayan UK.

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<sup>20</sup> Eureka Street website: [www.eurekastreet.com.au](http://www.eurekastreet.com.au).

RiAus is an independent, not for profit organization with foundation support from the Government of South Australia, the Commonwealth Government and Santos. RiAus was listed as a DGR entity in *the Income Tax Act 1997* on April 16, 2009 and was subsequently registered as a charity on December 3, 2012.

Charitable entities promoting or supporting independent journalism appear to satisfy requirements for registration as a charity but seem unlikely to be endorsed as GDR organizations. In 2009, the Institute for Social Research of Swinburne University of Technology in 2009 established the *Public Interest Journalism Foundation*. The foundation encourages conversations, collaborations, and experiments to sustain public interest journalism. Its aim is to develop new approaches to journalism that “maximize and explore the applications of emerging media technologies.”<sup>21</sup> In 2012, the foundation became a stand-alone, independent organization and is now based at the Centre for Advanced Journalism at the University of Melbourne but it is not an integral part of the University. Although registered as a charity, as a stand-alone independent organization, it has not been granted DGR status by the ATO.

The *Asia Pacific Journalism Centre* was also established to strengthen the capacity of journalists and news organizations to produce high quality journalism, more informed journalism, and to better understand international human rights and governance issues in Australia and overseas. The center is an independent not-for-profit company limited by guarantee and registered as a charity. It also is not recognized by the ATO as a deductible gift recipient.

## **7. Community not-for-profit broadcasting**

In Australia, the community broadcasting sector is made up of approximately 400 local not-for-profit broadcasters whose operations are largely run by volunteers.<sup>22</sup> The activities of the sector range from radio services to local communities, services in a mix of non-English languages generally produced by ethnic communities sharing the same broadcasting facilities, minority-interest programs, Indigenous radio services, and broadcast of specialist programs (e.g., fine music) catering to specific tastes. Most services include news bulletins in their program schedule. Those serving local communities are likely to include significant amounts of local news and information as an integral part of their programming. Those serving larger communities may also devote time on their schedules to current affairs programming. While news and current affairs are included in the program line-up of community stations, they are not generally the main focus of the stations.

Stations can transmit paid sponsorship announcements (not advertising) to help run their operations. For most station such announcements do not raise significant amounts of revenues. Some stations also use membership fees and

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<sup>21</sup> Public Interest Journalism Foundation website: <http://www.pijf.com.au/about/>

<sup>22</sup> Community broadcasting exists in all the countries in this study, but their status differs widely. Not-for-profit operation is the norm; only some have charitable status of their own; many obtain the benefits of charitable and tax exempt status by operation within educational and religious charities or affiliation with foundations.



supporters' donations to help fund their operations. The largest component of revenue accruing to the sector comes from the Australian Government and is distributed via a grant scheme managed by the Community Broadcasting Foundation (CBF) – an independent non-profit funding agency for the community broadcasting sector.

The CBF is registered as a not-for profit charity but does not have DGR status. In 2014 CBF received almost AUD 18 million in Government funding for allocation to the community broadcasting sector. Under the CBF grants scheme, stations can obtain support funding for program and content production, infrastructure and operational support, training, and online developments.

The small size and volunteer structure of most community broadcasters is likely to be an impediment to securing DGR endorsement from taxation authorities. Consequently, most do not have DGR endorsement and are unable to offer income tax deductibility for donations from supporters.

The few community broadcasters with DGR status tend to be larger, better resourced than average. They are typically located in larger cities and include both general and specialist community broadcasters. The DGR status is usually linked to a special purpose public fund set up especially for the collection of donations and compliance with the related administrative and reporting obligations. These are some examples of community broadcasters with DGR status:

- Community Radio 2XX (Canberra)
- Community Radio Federation Ltd (3CR)
- Coffs Coast Community Radio
- Ethnic Broadcasting Association of Queensland (4EB)
- Ethnic Community Broadcasting Association of Victoria
- Music Broadcasting Society of Victoria
- Music Broadcasting Society of NSW
- Music Broadcasting Society of Queensland
- Sydney Educational Broadcasting Ltd

*The Community Broadcasting Association of Australia (CBAA)* is a national peak organization, which provides support to the community broadcasting sector. It is registered as a charitable organization but it is not endorsed as a DGR. Membership is voluntary on payment of an annual fee. Approximately 5% of its annual revenue (AUD 6.8 million in 2014) is derived from member fees and more than 80% of the total is in the form of Government grants to fund support activities and services provided to the community broadcasting sector.

The CBAA operates a national satellite network (known as the Community Radio Network), which enables subscribing community broadcasters to share and syndicate their content with other CBAA members. Currently over 100 talk and music programs are distributed nationally over the network, which also carries several CBAA flagship community radio programs including:

- *The National Radio News*: a joint initiative of the CBAA and Charles Stuart University provides 84 news bulletins (see accompanying Text box).
- *The Wire*: a daily current affairs program broadcast exclusively on community radio stations around Australia.

### **Community Radio 2XX FM Radio Canberra**

Canberra's 2XX FM radio, is one of Australia's longest running community broadcasters. It was first established in 1976 as a student radio station within the Australian national University and was subsequently incorporated as an independent community radio station. It is run almost entirely by almost 200 volunteers, assisted by a limited number of paid staff. It broadcasts some 135 hours of original content each week produced entirely by volunteers, supplemented by programs from other sources.

Programming includes coverage of local news and information, contemporary art and film, youth programs, literature, public events, current affairs, indigenous news, and multicultural content. According to the station (<http://www.2xxfm.org.au/>) the “content is designed to inform, inspire, challenge and entertain Canberrans who want something fresh and alternative” and its aims include:

- promoting local and national Australian artists and music by playing at least 55% Australian music each week;
- giving a voice to those who don't get a chance to tell their story on mainstream radio;
- building skills and empowering marginalised demographics of people, with training courses and special projects;
- providing a platform for young people interested in a career in media; and
- keeping independent and commercial-free radio alive in Canberra.

The station is a not for profit charity endorsed as a deductible gift recipient organization by the Australian Tax Office. Donors are eligible to deduct any donation to 2XX of \$2 or more from their taxable income. Most of its income (85% in 2014), however, is from government grants to community radio stations. Income from donations is less than 5 per cent of total.

Source: Various online sources and 2XX regulatory returns.

### **National Radio News**

National Radio News (NRN) is a partnership between the CBAA and Charles Sturt University and is supported financially by a grant from the Community Broadcasting Foundation. It aims to deliver an authoritative, independent, impartial, national news service specifically for the community broadcasting sector.

Hourly news bulletins are available to subscriber stations across Australia via the CBAA Community Radio Network. Each bulletin is four minutes long and is a mix of national and international news plus sport and finance. There is a particular focus on the information needs of people in regional areas. Bulletins are produced in a dedicated studio at 2MCE FM — a major teaching/practical training resource for the School Of Communication at Charles Sturt University in Bathurst NSW — licensed as a community radio station. The NRN is produced by three full-time journalists supported by cadet journalists from the School of Communication. News stories are sourced from the BBC, Sky News, ABC and the community radio sector.

Currently more than 80 stations, located in every state and territory in Australia, subscribe to the service on the basis of a progressive pricing structure which aims to charge stations according to their means as measured by gross annual revenue. CBAA members receive a 25 per cent discount.

Source: [www.cbba.org.au/national-radio-news](http://www.cbba.org.au/national-radio-news) and [www.csu.edu.au/faculty/arts/communication-creative-industries/2mce/about-us](http://www.csu.edu.au/faculty/arts/communication-creative-industries/2mce/about-us)

*The Indigenous Broadcasting Program* is a dedicated Government funding scheme in support of remote Indigenous community broadcasters, which is currently administered by the Department of the Prime Minister and Cabinet. The program includes funding of a *National Indigenous News Service* (NINS). The service produces hourly bulletins, which are distributed nationally via satellite and available free of charge to remote Indigenous broadcasters.

## 8. Philanthropic and other support to news organizations

Australia is ranked in the top 10 countries in the Charities Aid Foundation's *World Giving Index* (6<sup>th</sup> in 2014).<sup>23</sup> However, while individual giving is generous by world standards, individual and corporate philanthropy is not as prominent as in many other developed countries (<http://www.philanthropy.org.au>). In particular, cases of philanthropic support of news organizations have been scarce.

One prominent recent case of philanthropic support of a news organization was the establishment of a not-for-profit multimedia site for long-form public interest journalism, *The Global Mail*, in February 2012 with a five-year funding pledge by the Australian internet entrepreneur Graeme Wood, a co-founder of the *Wotif* internet travel and accommodation website. The aim of the venture was to provide the public generally with free access to independent long-form journalism rather than cover general daily news. Its site suggests that: "Our mission is to deliver original, fearless, independent journalism. We strive to inform, provoke, expose – and entertain."<sup>24</sup>

Despite it being well-resourced with experienced and respected journalists, editors and other staff, the website did not prove sufficiently popular with consumers. In January 2014, the failure to reach anticipated audience targets eventually led Graeme Wood to withdraw his funding support of the venture. Attempts to obtain support from alternative funding sources both philanthropic and commercial were not fruitful and the site was closed just two years after its establishment.

Prior to withdrawing his funding support from *The Global Mail*, Wood had become a significant financial investor in the *Guardian Australia* news website venture, launched 27 May 2013. Wood's investment is not in the form of stock and does not entitle him to be a member of the venture's board.<sup>25</sup> The Guardian Media Group of the Scott Trust Limited controls the *Guardian Australia* to ensure independent journalism.

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<sup>23</sup> <https://www.cafonline.org/publications/2014-publications/world-giving-index-2014.aspx>

<sup>24</sup> A. Meade, Global Mail website to close less than two years after its launch, *The Guardian Australian Edition*, 30 January 2014, <http://www.theguardian.com/media/2014/jan/30/global-mail-website-to-close>.

<sup>25</sup> M. Sweney, Guardian News & Media to launch digital Australia edition, *The Guardian Media Blog Australia*, 16 January 2013, <http://www.theguardian.com/media/2013/jan/15/guardian-launch-digital-australia-edition>.

Another initiative involving philanthropic support is the 13 November 2013 launch of an online news website, *The New Daily*, by three superannuation (pension) funds. At the time of the launch, the managing editor stated that the backers' commitment was "open-ended" and that they had "agreed to a charter of editorial independence".<sup>26</sup> *The New Daily* is headquartered in Melbourne. Content produced by its editorial staff and contributors, is supplemented with video clips and news copy provide by the National public Broadcaster (ABC) under a commercial sharing agreement. Access to the site is free and the three superannuation funds promote it heavily among their combined 5.5 million members. At the time of the launch the backers anticipated that *The New Daily* would become financially self-sufficient over 3-5 years by selling advertising.

*Independent Australia* (independentaustralia.net) is another online "progressive journal focusing on politics, democracy, the environment, Australian history and Australian identity" owned by the Donavan Family Trust (discretionary trading trust). *Independent Australia* supports independent politics and politicians not affiliated with political parties.<sup>27</sup> Its focus is on independent reporting of significant issues in Australia.

*Crikey* ([www.crikey.com.au](http://www.crikey.com.au)) is one of the earliest independent online news start-ups in Australia and was first published in 2000. It has since built up a sizeable following. *Crikey* provides free access to some content on its website and most of its original reporting is locked and available only to subscribers.

*The Saturday Paper* ([www.thesaturdaypaper.com.au](http://www.thesaturdaypaper.com.au)) is a weekly print and online newspaper launched on March 1, 2014. It is a commercial venture funded by subscription and advertising. Access to content on its website is protected by a paywall with free access to a limited number of stories.

## 9. Recent efforts to extend charity status to news organizations

There have been recent efforts to extend charity status to news organizations. The *Charities Act 2013* sought to introduce a statutory definition of charity to resolve some of the inherent uncertainties of the then prevailing common law approach in determining the legal meaning of charity. The objective of the statutory definition was to provide greater clarity and certainty without constraining the use of common law to extend charitable status to other beneficial purposes relevant to contemporary Australia.

The *Charities Act* was preceded by more than a decade of extensive public debate and proposals for reform. In 2001, the commissioning of an Inquiry into the "Definition of Charities and Related organizations by the Australian Government" was a major step towards the eventual reform into charity status to news organizations. Its recommendation for a modern statutory definition of charity was put aside by the then government which opted instead for a much more limited intervention to remove legal doubt over the charitable status of childcare; self-help bodies; and closed/contemplative religious orders.

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<sup>26</sup> <http://www.abc.net.au/news/2013-11-13/new-daily-launches/5087940>.

<sup>27</sup> Independent Australia website: [independentaustralia.net](http://independentaustralia.net).

The predominant responsibility for administering the definition of charity under the new arrangements passed from taxation authorities to the ACNC, which was established a year earlier. According to the ACNC Commissioner,<sup>28</sup> the Charities Act added “reconciliation, human rights, culture, the environment and more to the list of purposes that are considered charitable, ... recognised that many modern organizations advance causes through education, research and awareness-raising and prevention ... (and opened) the door to charity status for organizations that do good in new ways – ways that have evolved due to the dramatic changes in our world, our communities and our technologies.”

Tax treatment of the not-for-profit sector was also under scrutiny as part of the public debate on wider reform. In March 2009, the Australian Government commissioned a research study by the Productivity Commission on the not-for-profit sector’s contribution to society including, *inter alia*, an examination of “the extent to which tax deductibility influences both decisions to donate and the overall pool of philanthropic funds”.<sup>29</sup> The report concluded that “gift deductibility should be widened to include all tax endorsed charities in the interests of equity and simplicity” and recommended progressive widening of “the scope for gift deductibility to include all endorsed charitable institutions and charitable funds”. According to the Commission, incremental implementation would have enabled the Government to consider the consequential impact of the tax revenue particularly with regard to the deductibility of donations to religious and educational organizations.

In February 2012, the Commonwealth Assistant Treasurer, the Hon. Mark Arbib, established *The Not-for-Profit Sector Tax Concession Working Group*, to “consider whether there are better ways of delivering the current envelope of support provided through tax concessions to the NFP sector by the Australian Government” as recommended by the Productivity Commission.”<sup>30</sup> The group reviewed the full range of tax concessions including DGR status and, consistent with the Productivity Commission’s proposal, recommended that:

*DGR status should be extended to all charities that are registered with the ACNC, but use of tax deductible donations should be restricted to purposes and activities that are not solely for the advancement of religion, or the advancement of education through child care and primary and secondary education, except where the activity is sufficiently related to advancing another charitable purpose.*<sup>31</sup>

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<sup>28</sup> S. Pascoe, Charities Act to take effect from 1 Jan 2014, ACNC media release No.061, 16 December, [http://www.acnc.gov.au/ACNC/Comms/Med\\_R/MR\\_061.aspx](http://www.acnc.gov.au/ACNC/Comms/Med_R/MR_061.aspx).

<sup>29</sup> Productivity Commission (2010), Contribution of the Not-for-Profit Sector, Research Report, Canberra.

<sup>30</sup> Not-for-Profit Sector Tax Concession Working Group, Fairer, simpler and more effective tax concessions for the not-for-profit sector, Final Report, May 2013, The Australian Government, the Treasury, Canberra.

<sup>31</sup> Ibid.

The group's recommendation was not adopted by the then Labor Government and there is little interest in the current Conservative Government to implement such a proposal. Nonetheless, the DGR arrangements may feature in a foreshadowed comprehensive review of the tax system.

Meanwhile, the Public Interest Journalism Foundation has been conducting an ongoing campaign for tax deductibility of philanthropic donations to not-for-profit news organizations and public interest journalism. Its underlying argument has been that investigative and quality journalism provides a public benefit no less worthy of support as other endeavors such as community broadcasting, the arts, libraries and museums. In a 2011 open letter to the Government and political parties, the foundation appealed for the introduction of tax deductibility for not-for-profit media organizations or for journalistic investigations. That same year, it also presented a submission arguing for such measures to the Independent Inquiry into the Media and Media Regulation (IIMMR) established later in 2011 (Finkelstein Inquiry) to report on the effectiveness of media codes of practice in Australia, and the impact of technological change on traditional media business models. Several other submissions to the Inquiry, including that of the Greens (political party), and a number of journalism Academics supported similar measures.

Noting the experience in the USA, the Inquiry acknowledged that the government could play a role in providing incentives for philanthropic investment in news production. However, it concluded that: "at this stage there is not a case for government support." Nevertheless, as the situation was changing rapidly, the Inquiry saw a need for careful monitoring of developments. In the event assistance was warranted, the Inquiry suggested that the Government could consider making "donations towards non-profit or low-profit journalism organizations tax-deductible or exempt" and possibly set up a fund to subsidize investigative and public interest journalism.<sup>32</sup>

To date, there has been no indication of willingness by policy makers or relevant authorities to seriously consider, let alone adopt, changes to existing arrangements.

#### **10. Current views on tax deductibility of donations to news organizations**

In the current Australian context, the inability to access tax deductions for philanthropic donations to not-for-profit news organizations does not appear to be a major cause of concern. While there have been some calls for tax deductibility of donations to news organizations, the disposition towards such concession among policy makers is at best only lukewarm.

Reform of the not-for-profit sector was firmly on the agenda of consecutive Australian Governments of different political persuasions during the first decade of this century and culminated in major initiatives such as the establishment of

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<sup>32</sup> Independent Inquiry into the Media and Media Regulation, Report to the Minister for Broadband, Communications and the Digital Economy, Commonwealth of Australia, Canberra, 2012.

the ACNC and the statutory definition of charity and charitable purposes by the then Labor Government which was expressly sympathetic to the sector. However, the Government did not act on recommendations received from its own officially commissioned reviews to extend tax deductibility of donations to all registered charities, but did acknowledge that financing of the sector required further consideration. Speaking at the National Press Club on the Government's reform agenda for the sector, the then Minister for Financial Services and Superannuation said:

*We need to think more about how to create a capital market for the not-for-profit sector, how to support increased social engagement through community enterprise, how to make it possible for individuals to invest in social impact.*<sup>33</sup>

A few months later, the then shadow Minister for Communications, (subsequently the Minister for Communications and Prime Minister) Malcom Turnbull, did not exclude the possibility of favorable tax treatment of philanthropic donations to newspapers:

*there would be some merit in considering whether some level of support could be given, in terms of deductible gift recipient status, for not for profit newspapers, online or hard copy or both, which committed to a code of conduct analogous perhaps to that subscribed to by the ABC.*

*I simply pose this as something to consider – at this stage the Coalition is looking for ways to cut expenditure and new tax breaks are not in the offing, but in the interests of looking beyond the next few weeks or even the next election, we should also be looking hard at how we ensure the survival of journalism.*<sup>34</sup>

Since then, the issue of tax deductibility for philanthropic donations to news organizations has featured only occasionally in public debate. Other than for incidental passing references, policy makers have shown little, if any interest, in measures to provide financial support to journalism.

The Conservative Government, which came to power in 2013, is not as well disposed as the previous Labor government towards the not-for-profit sector. Indeed, the Conservative Government is committed to dismantling some of reforms introduced by its predecessor, including abolition of the sector's regulator and returning the related responsibility to the ATO.

With relation to news organizations, the Conservative Government's predominant view is that online news sources will provide sufficient diversity of

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<sup>33</sup> W. (Bill) Shorten, *Passing Round the Hat for Change: This Labor Government and the Not-For-Profit Sector*, Speech to National Press Club, Canberra, 27 May 2011.

<sup>34</sup> M. Turnbull, the Hon. Minister for Communications, *The Future of Newspapers – Is it the End of Journalism?* Speech to Centre for Advancing Journalism, University of Melbourne, 8 December 2011.

viewpoints and that public interest journalism is well served by the extensive news resources of publicly funded broadcasters and by emerging commercial online initiatives. The Government therefore sees no need for measures to assist or promote further development of news organizations.

### **11. Impact of charitable status on development of not-for profit news organizations**

In addressing this issue it is important to distinguish between charitable status and deductible gift recipient status. It should be recalled that in the Australian context, the two are different concepts. While a registered charity may also have DGR status, most Australian registered charities are not DGRs. All registered charities, however, do benefit from other taxation concession.

Prior to 2012, if community broadcasters for which news is an ancillary activity were excluded, there were no news organizations with charitable status. Most of those that have since acquired charitable status had been established and were operating as news organizations well before receiving such status. This suggests that having charitable status was not a primary consideration in their establishment and development.

The more desirable and difficult to obtain DGR status figures prominently in some more recently established news organizations. Obtaining DGR status was a significant consideration in the establishment of *The Conversation* and is seen by the organization as an important element in maintaining the financial viability of its business model.

The difficulty of securing DGR status may well discourage the establishment of potential news organizations. There is no established body of evidence that can be used to determine to what extent this may be true. A more critical question, however, would be: is the lack of such status significantly hampering the development of a sufficiently diverse and vibrant news sector?

This question was addressed in the report of the Finkelstein Inquiry. Noting that the Internet had changed the way news was consumed and had greatly expanded the range and diversity of available sources, the Inquiry concluded that substantial market intervention by the government was not warranted. Since then, the diversity of Australia's news landscape has increased further. National and international media organizations have established a local presence with varying degrees of success. And while a small number have access to tax-deductible donations or have received other philanthropic support, most of them were set up as independent commercial initiatives.

Significant examples of new local initiatives established since the time of the Finkelstein Inquiry are *The Conversation* (2011) with DGR status, *The New Daily* (2013) with institutional start-up support but seeking to become self-sustainable, and *The Saturday Paper* (2014) a primarily commercial venture. Recently established international brands include the Guardian Australia (2013), the Mail Online (2014) BuzzFeed (2014) and the Huffington Post (2015),



all operate commercially, but the Guardian is operated in a not-for-profit manner under the Scott Trust in the UK.

While the established traditional newspapers have suffered considerable cutbacks to their operations and are still facing tough times ahead as they seek to restructure to better compete in the digital environment, they are all expected to continue being major influential players in the supply of news.<sup>35</sup> The situation was well summed up in 2014 by then Minister for Communications and current Prime Minister of Australia as follows:

*I gave a speech in 2012 expressing a genuine concern that the very foundations of journalism, the most powerful organs of free speech, the great newspapers themselves are struggling to survive. Those concerns are still valid, but it is clear that in the last two years the industry has responded to the challenge in an innovative manner that gives us every cause for optimism about your future.*<sup>36</sup>

### Summary of the contemporary situation

Australia has a vibrant not-for-profit media scene, but most organizations seek the benefits of charitable and deductible gift status by structuring themselves as enterprises serving other-than-media purposes or they pursue other methods for receiving support. Contemporary business challenges to news enterprises have produced discussions about potentially specifying news provision as an acceptable charitable and deductible gift purpose, but significant action toward that objective have not yet emerged.

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<sup>35</sup> F. Papandrea, State of the Newspaper Industry in Australia 2013, News and Media Research Centre, University of Canberra, <http://www.canberra.edu.au/research/faculty-research-centres/nmrc/publications/documents/State-of-the-Newspaper-Industry-web-publication.pdf>.

<sup>36</sup> M. Turnbull, the Hon. Minister for Communications, Innovation and Deregulation in the Internet Age, Minister for Communications Speech to the Newspaper Works Forum, 21 August 2014.

## Canada: The Impact of Charity and Tax Law/Regulation on Not-for-Profit News Organizations

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Canada has had little experience with not-for-profit news organizations, historically relying on local and national commercial newspapers and broadcasters, the public broadcaster CBC, and national commercial broadcast channels to provide news. That system is beginning to break down as loss of audiences and advertising, massive mergers and acquisitions and their attendant debt, and layoffs and mergers of newsrooms have occurred.<sup>37</sup> Although some digital news providers are appearing, particularly at the local level, and some universities are beginning to provide news to the public as part of their journalism training programs, they are struggling to create a stable financial basis and a few voices are beginning to suggest that philanthropy and subsidies may be necessary.<sup>38</sup>

The current situation presents challenges for news organizations that may wish to operate as not-for-profit entities because there is no legal basis upon which media organizations, *per se*, can be granted charitable status in Canada. To the extent any charities in Canada are ‘news’ organizations it is incidental to their main, charitable purpose.

A news organization may be a not-for-profit if it is organized in that manner. And with creative planning news organizations may be able to structure themselves so as to at least partly avail themselves of the tax advantages given to not-for-profit organizations.

Registered charity status in Canada carries with it two primary benefits. First, income of the entity is generally non taxable. Second, there are tax incentives to encourage donations to such groups. Not-for-profits, as opposed to charities, are only entitled to the former.

The determination of what is charitable in Canada is made by the Canada Revenue Agency with reference to the common law. Appeals lie to the Federal Court of Appeal. The development of the common law in Canada has effectively been stopped for over thirty years.

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<sup>37</sup> Marc Edge. *Convergence after the collapse: the “catastrophic” case of Canada*. Media, Culture & Society, 33 (8), 2011, pp. 1266-1278; the effects of mergers and acquisitions are documented by the Canadian Media Concentration Research Project, Growth and Concentration Trends in the English-language Network Media Economy in Canada, 2000-2014, 2015. Available at: [http://www.cmcrp.org/wp-content/uploads/2015/11/Media\\_InternetConcentration1984-2014\\_for\\_web.pdf](http://www.cmcrp.org/wp-content/uploads/2015/11/Media_InternetConcentration1984-2014_for_web.pdf)

<sup>38</sup> CBC Radio, After massive layoffs, how can Canadian journalism survive? The Current with Anna Maria Tremonti, January 28, 2016. Available at: <http://www.cbc.ca/radio/thecurrent/the-current-for-january-28-2016-1.3423319/after-massive-layoffs-how-can-canadian-journalism-survive-1.3423347>

## 1. Introduction

Canada is a confederation of provinces and territories. It was created by the British North America Act of 1867, later renamed the Constitution Act.<sup>39</sup> Among other things, the Constitution Act divided the powers to govern the country between the Federal and Provincial Governments. Specifically, it stated in the division of powers section 92 that:

*In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,  
[...].7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.*

This constitutional preamble is necessary to understand the current state of stagnation in Canada's charity law system, but it can only be properly understood in its historical context.

### *History*

During the First World War, the Federal Government levied the first income tax under the Income War Tax of 1917.<sup>40</sup> That Act also contained the very first deductions for donations by the public to certain wartime charities. After the war, the Income War Tax Act became the Income Tax Act and was never repealed.

During the 1930s, the Federal Government decided to provide an exemption from income tax for charitable organizations. There ensued in the Federal Parliament a discussion over the extent to which this exemption should be distributed. The discussions were sufficiently volatile that Parliament ducked the question and left the definition of charity to the common law by simply including the word "charity" as an undefined word within the Act. To this day, Canada still does not have a defined term for charity and, at least in theory, the definition is only extended by judicial decision.

It bears mentioning that the collection of income tax is a shared federal and provincial jurisdiction. However, by mutual agreement between the provinces (except Québec) and the Federal Government, the promulgation of laws and regulations related to the imposition of tax as well as the actual administrative collection are left to the latter. Thus, the Federal Government's decision to leave the term "charity" undefined for the purposes of the Income Tax Act affected virtually the entire country.

In the 1960s, in response to widespread abuse of the system, the Federal Government decided to put in place a registration system so that only registered organizations would be granted the benefits of charitable status. Today, those

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<sup>39</sup> 30 & 31 Victoria, c. 3 (UK), R.S.C. 1985, App. II, No. 11.

<sup>40</sup> S.C. 1917, c. 28, s. 8.

benefits include the right to earn income tax-free and to issue donation receipts that entitle individual donors to tax credits and corporate donors to tax deductions. The right to be registered was, and still is, based on the common law.

The registration system was implemented as part of the Income Tax Act, for two reasons. The first related to the constitutional authority problem. While the Federal Government has no jurisdiction for the regulation of charities, it does have authority to administer an income tax. Given the connection between the registration system and the aim of protecting against abuse of the tax benefits extended to charities, the new provisions could reasonably fall under the federal income taxing power. The second consideration was simply that, short of a national-provincial agreement, there was no way such a system could have been legislated.

By incorporating the charity registration system as part of the income tax administration decisions over charity registration was incorporated into the general system for the implementation and collection of income tax. This meant that Revenue Canada (now the Canada Revenue Agency, or “CRA”) would be responsible for the registration of charities and that the dispute resolution system dedicated to income tax disputes would now be used to resolve disputes over what is and is not charitable.

In practice, the decisions over what is a charity are primarily decided by application to the CRA for registered charity status. If the CRA refuses to register an organization on the basis that it is not charitable, the organization may appeal the decision to the Federal Court of Appeal. The Federal Court of Appeal is part of the system that acts as arbiter for most disputes involving the Federal Government. These disputes often involve technical matters and, according to Canadian law, the Court may defer to at least some extent to technical experts. It has been argued that the Federal Court of Appeal shows a level of deference to the CRA akin to what it would show arbiters of issues of specific technical knowledge.<sup>41</sup> Unfortunately, the decisions as to what falls into or out of the definition of a charity are not technical issues but rather issues of law.

Given the importance of donations as the lifeblood of charities, decisions about charity registrations eventually became the most important source of advancement (or lack thereof) of the common law definition of charity. This was further propelled by a distinct lack of cases being decided provincially on the same issue and a general level of deferment to the Federal Court decisions in this area. There being no cases provincially and no wins for charities federally, the definition of charity has not substantially progressed in Canada in the past forty years.

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<sup>41</sup> Kathryn Chan. The Fourth Head in the Courts: Incremental Expansion or Judicial Freeze? Paper presented to The Canadian Bar Association National Charity Law Symposium, Toronto, May 7, 2008.

## *Media Organizations*

Against this backdrop, issues dealing with news organizations are a negligible part of the charity scene in Canada. There have been no dealings specifically with the regulation of charities and neither is there any guidance put out by the CRA specifically on this point.

Canada does have an active community radio sector serving communities underserved by commercial broadcasters. These are not-for-profit enterprises, often associated with educational institutions or operated by independent cooperatives. More than 150 stations operate across the country, gaining revenue from donations, memberships, and some advertising. Some broadcasters serving non-English populations and indigenous population receive federal and provincial grants. These broadcasters are typically set up as not-for-profit enterprises, but do not themselves have charitable status. Those with charitable status typically obtain it as organizations with religious or educational purposes that are then pursued through broadcasting.

## **2. Charity and Tax Laws Governing the Granting of Charitable Status**

From a constitutional perspective the decision of whether or not something is a charity is based on the common law. In the past, Canada relied mostly on English precedent for advances to the common law. Now that England and Wales has codified its definition of charity, there are fewer sources for advancement in this area.

Because the area is constitutionally within provincial jurisdiction, courts of competent jurisdiction in the various provinces could, in theory, form a decision relevant to a provincial legal matter that extends the meaning of the term in that Province. Practically speaking, the definition of charity is mostly the purview of the Federal Court of Appeal<sup>42</sup> and, occasionally, the Supreme Court of Canada.<sup>43</sup>

Although charitable status is granted according to the common law, it can be revoked for failure to comply with the charity regulatory system within the Income Tax Act.

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<sup>42</sup> See for example *Humanics Institute v. The Queen*, 2015 DTC 5012 [at 5542], 2014 FCA 265, *News to You Canada v. M.N.R.*, 2011 DTC 5105 [at 5916], 2011 FCA 192, *Hostelling International Canada - Ontario East Region v. MNR*, 2009 DTC 5643, 2008 FCA 396, *Travel Just v. CRA*, 2007 DTC 5012, 2006 FCA 343, *Fuaran Foundation v. CCRA*, 2004 DTC 6399, 2004 FCA 181, *Alliance for Life v. The Queen*, 99 DTC 5228, *Action des Femmes Handicapées (Montreal) v. MNR*, 98 DTC 6528 (FCA), *Human Life International in Canada Inc. v. MNR*, 98 DTC 6196 (FCA), *Interfaith Development Education Association, Burlington v. MNR*, 97 DTC 5424 (FCA), *Stop the Violence ... Face the Music Society v. The Queen*, 97 DTC 5026 (FCA), *Briarpatch Inc. v. The Queen*, 96 DTC 6294 (FCA).

<sup>43</sup> Historically, the the Supreme Court has only considered three cases involving the definition of charity. The first was in 1966, *Guaranty Trust Co. of Canada v Minister of National Revenue*, 1966 CanLII 40 (SCC), [1967] S.C.R. 133. The *Vancouver Society of Immigrant and Visible Minority Women v M.N.R.*, [1999] 1 S.C.R. 10 in 1999 and in 2007 the *A.Y.S.A. Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2007 SCC 42.

### 3. Do Charity and Tax Laws Permit News Organizations to be Tax-Exempt Organizations that Can Receive Tax- Deductible Gifts?

Because the test for charitable nature is a common law one, and to our knowledge there is no precedent in the common law world for news organizations to have charitable status, we would conclude that charity laws in Canada do not allow news organizations to both be tax-exempt and receive tax-deductible (or tax-creditable) gifts. However, it is possible to create a news organization that is tax-exempt, albeit with certain restrictions.

In addition to registered charities, Canada permits the formation of not-for-profit organizations. These organizations are exempt from tax but cannot issue receipts for donations resulting in tax deductions or credits in exchange for donations. A not-for-profit organization is defined in the Income Tax Act as follows:

*149.(1) No tax is payable under this Part on the taxable income of a person for a period when that person was:*

*[...](l) a club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member or shareholder was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in Canada.*

So long as a news organization meets this definition, there is no reason why it could not be a not-for-profit.<sup>44</sup> Such an organization could receive a tax-deductible gift even if it cannot issue a receipt in the same way that a charity can. This is because the tax system allows for deductions of expenses made for the purpose of incurring income. So, if a for-profit corporation had some business reason for making a gift to the not-for-profit (say, for a sponsorship), this amount could be deducted from the donor's income for tax purposes. However, this situation is distinct from one where the not-for-profit engages in profit-making activities, which are generally disallowed to such organizations.

### 4. The Rationale for the Current State of Affairs

As mentioned in the introduction, the charitable system in Canada is effectively in disarray. Theoretically, the jurisdiction to decide what is and what is not charitable belongs to the individual provinces, yet it is the Federal Government that is practically in charge of that definition. Moreover, the Federal Parliament has been so afraid to discuss the definition of charity that the one and only discussion, which took place in the 1930s, was truncated and left to the Courts because of the difficult political nature of the discussion. (That is, no MP wanted to be seen as disparaging a 'good cause'). The key question is why the provinces

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<sup>44</sup> However, it should be noted that we are expecting a dramatic overhaul of the not-for-profit system in Canada, so this situation could change.

have decided to abdicate their jurisdiction in this area. There appears to be no single reason for that.

### **5. Do Any Procedural Hindrances Exist?**

There are no procedural hindrances specific to the registration of news organizations in Canada. The fundamental hindrance is one of law. There are no grounds upon which a news organization may be registered as a charity in this country. Short of winning a case before the Courts, there is simply no chance of success for a news organization applying for registered charity status in Canada.

### **6. Are There Charitable/Tax Exempt News Organizations in the Country?**

For the reasons discussed above, there are no charitable news organizations in Canada.

A request under Canada's Access to Information legislation for a list of charitable news entities in the country elicited a response from the CRA Charities Directorate that it does not register news organizations because they do not qualify for charitable status in Canada.

However, as also discussed previously, it is possible to create a tax-exempt news organization. Tax-exempt organizations do not pay tax on their income, but may not issue tax-deductible or tax-creditable income receipts for donations. An organization that could be tax-exempt must first qualify as a not-for-profit under section 149.1(l) of the Income Tax Act.

There is no specific registry of not-for-profit organizations in Canada, so it is impossible to know with certainty whether there are any news organizations that qualify as such. Nevertheless, we believe that there may be a number of not-for-profit news organizations in this country. We expect these are small, topic-specific organizations that attempt to deliver information on their topic of interest to a relatively small community. There are no large tax-exempt news organizations in operation. Small news organizations such as university radio stations may receive charitable status on the basis that they educate students in radio operation. Similarly, media organizations operated by Aboriginals for the Aboriginal community may receive charitable status based on the special status Aboriginals have in Canadian law but not because it is a media organization.<sup>45</sup>

### **7. Are News Organizations Able to Receive Gifts/Grants through Some Other Structure?**

The above heading presupposes that only registered charities are able to receive gifts and grants. This is not true in Canada, where any organization can receive a gift. However, the tax-deductibility of the gift is based on either the purpose of the gift (if given by a corporation) or on whether a charitable donation tax receipt is issued (if given by either a corporation or an individual).

For example, an environmental firm may find a business reason to give a grant to the Canadian Broadcasting Corporation's radio arm for the purpose of

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<sup>45</sup> See *Native Communications Society of B.C. v. M.N.R.*, 86 DTC 6353, [1986] 2 CTC 170 (FCA).



producing documentaries about the production of oil sands. The grant may be deductible if the purpose of the gift is reasonably related to producing income to the donor (such as raising the public perception of need for its product). The exact same tax consequences would result as though the CBC were a charity and could issue a charitable donation tax receipt.

The other likely method for such gifts would be if the news organization were a not-for-profit, as described earlier in this analysis.

We would also point out that while registered Canadian charities cannot give money to for-profit entities, there is no barrier to the funding of such organizations by foreign charities.

Finally, it should be noted that charities are able to work with for-profit or not-for-profit organizations that are carrying on projects that further the aims of the charity. To do this, the charity must create an agency relationship with the third party organization. When this is done, the charity must exercise complete control and direction over the joint project. For example, in the context of a news organization, the project would have to further the charity's stated aims and the charity would have to have control and direction over the news organization's work. While this may be a solution to providing funds to a third party news organization, it would be a clear breach of ethics for the news organization's efforts to be put under the direction and control of the funder. Neither would this work for fundraising.

It should be noted that charities are able to participate in for-profit ventures. This is typically avoided because charities are often very averse to both business and reputational risk. Nevertheless, a charity could invest in any business venture that it deems a prudent risk. Thus, one available structure for a charity to fund a news organization is where a charity believes that a news business is viable and invests its assets there in order to earn income. There are restrictions on how a charity can engage in a business, unless the business is run entirely by volunteers.

## **8. Have Recent Efforts Been Made to Permit Newspapers, Digital Media and other Media to Become Charities?**

Various attempts have been made by leading organizations to modernize the law of charity in Canada in recent years. While there is some pressure to codify the definition of charity generally, there is no specific thought being given to news organizations.

Nevertheless, various charitable organizations operate different types of media. In Canada, charities are entitled to use any media they wish to pursue their charitable goals. In fact, there are entire television channels run by charitable entities in the various provinces. There are religious organizations that only run websites, and Aboriginal radio stations that are charities. However, charitable status was not granted to these entities because of the types of media they use but rather because of the purposes for which they are used.



No current efforts are underway that would specifically designate news as a purpose under charity laws or would otherwise alter existing law and regulation to specifically accommodate news enterprises.

### **9. What Do the Tax Authorities, Parliamentarians and Media Personnel Think About Charitable Status for News Organizations?**

There is currently no political debate in Canada on the possibility to grant charitable status for news organizations. However, given the state of the publishing industry it is possible that this might change and politicians and stakeholders might consider this question in the future.

There is growing discussion of financial difficulties being faced by news enterprises, particularly newspapers, and arguments that some policy responses may be necessary. This prompted the Parliamentary Standing Committee on Canadian Heritage launched an inquiry into the challenges faced by the press in February 2016. Much of the discussion has focused on competition policy and subsidization, but has not yet focused discussion on issues involve charitable status.

### **10. How Does the Presence or Lack of Charitable Status affect the Development of Not-for-profit News Organizations?**

This question is impossible to answer with certainty, but one must imagine that if such status were available and desirable, it would be used. Its absence has therefore presumably stymied the development of some such groups.

Most digital news providers that are operating today do so as commercial entities, even at the local level. Many are supported by subscription fees, a strategy made easier because the majority of Canadian newspaper operate with paywalls.

### **Summary of the contemporary situation**

Canada has a limited not-for-profit media, primarily community broadcasting and a few local digital organizations. Because of the current regulatory schemes, most of these enterprises organize themselves as serving religious, educational, and other recognized purposes that can attain charitable and tax exempt status or pursuing support through other charities or foundations. Rising concerns about the state of Canadian news provision is now leading to discussions of policy options but issues of charitable status have not yet moved to the forefront.

## **Ireland: The impact of charity and tax law/regulation on not-for-profit news organizations**

Roderick Flynn  
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Ireland has a mix of commercial and public service media providing news and because the country's small population financial resources to support their operation is constrained. Despite the challenges, no mainstream news organization in Ireland has charity status, nor have any seriously explored the acquisition of such a status. However, as traditional sources of funding (circulation revenue and advertising) become less predictable, there is evidence of an increasing willingness to contemplate alternate revenue sources/cost reduction mechanisms associated with charity status.

- Charity status in Ireland confers two main benefits on charities: 1) it facilitates seeking funding by exempting contributions to charities from personal tax liabilities and 2) it may allow charities to reduce or eliminate their own tax liabilities.
- Those media organizations which do have charity status in Ireland are almost exclusively religious in nature.
- Media organizations are not explicitly identified in law as potential candidates for charity status, although news organizations do appear to meet at least some of the legal criteria defining charity status in Ireland.
- Policy-makers and tax officials are at least notionally open to the idea of discussing an extension of charity status.
- In practice, tax officials have not looked favorably on applications for charity status, even from community (i.e. not-for-profit) media organizations, on the grounds that their main area of activity is media production rather than charity.

### **1. What charity and tax laws and regulations govern the granting of charitable status?**

The 2009 Charities Act both created a legal definition of what constitutes a charity and created the Charities Regulatory Authority (CRA) which maintains a register of recognized charities in Ireland. However, "charitable status" under the 2009 act does not automatically confer tax exempt status on an organization. Thus the various tax laws (most notably the 1997 Taxes Consolidation Act) are also relevant because they confer the power to grant tax exemption on the grounds of charitable status to the Irish Revenue Commissioners. While taking the CRA's register into account, the Revenue Commissioners may decide that a registered charity fails to meet their own criteria and deny tax exempt status.

The status of charitable organizations is governed by the Charities Act 2009, which replaced the previous 1961 legislation. Section 2 of the Act defines a charitable organization as a body which "promotes a charitable purpose only" and which dedicates all of its financial resources towards that purpose (except insofar as it must spend monies on staff salaries/pensions or, in the case of

religious organizations, on accommodation and care of members of that community). (Section 2).

In section 3, the act defines “charitable purposes” under four categories:

1. The prevention or relief of poverty or economic hardship;
2. The advancement of education;
3. The advancement of religion;
4. Any other purpose that is of benefit to the community.

The last category is broad. In a bid to delineate what is meant section 3.11 of the 2009 Act offers 12 examples of what might be included under that heading:

1. The advancement of community welfare including the relief of those in need by reason of youth, age, ill-health, or disability;
2. The advancement of community development, including rural or urban regeneration,
3. The promotion of civic responsibility or voluntary work;
4. The promotion of health, including the prevention or relief of sickness, disease or human suffering;
5. The advancement of conflict resolution or reconciliation;
6. The promotion of religious or racial harmony and harmonious community relations,
7. The protection of the natural environment;
8. The advancement of environmental sustainability;
9. The advancement of the efficient and effective use of the property of charitable organizations;
10. The prevention or relief of suffering of animals;
11. The advancement of the arts, culture, heritage or sciences; and
12. The integration of those who are disadvantaged, and the promotion of their full participation, in society.

The 2009 Charity Act also created a new institution: the Charities Regulatory Authority. This regulatory authority maintains an official register of charitable organizations. Charities must apply to be included in the register if they are to acquire or retain their status as charities.

Although charitable status may be a prerequisite for media organizations seeking exemption from categories of taxation, the Charities Regulatory Authority cannot, in and of itself, confer such advantages. That right remains the exclusive preserve of the Revenue Commissioners who assess whether an applicant for a charitable tax exemption meets one of more of the criteria outlined in the Charity Act and, if satisfied that this is the case, they then consider whether the income and property of the applicant body is applied for “charitable purposes only”.<sup>46</sup> In other words, it is possible that the Revenue

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<sup>46</sup> See Revenue Commissioners note “Tax Exemption for Charities under Sections 207 and 208 TCA 1997”. Reviewed May 2015.

Commissioners may not accord tax-exempt status to an institution already designated as a charity by the Charities Regulatory Authority (signified by the award of what is known as the “CHY number” designation).

If an organization seeking charity status is adjudged to fall under one of the Charity Act’s charitable purposes and the Revenue Commissioners consider that the organization’s income and property is exclusively applied to charitable purposes, the Revenue Commissioners may grant that organization or donations to that organization exemptions from the following categories of tax:

- a) Income tax
- b) Corporation Tax
- c) Capital Gains Tax
- d) Deposit Interest Retention Tax
- e) Capital acquisitions tax and
- f) Stamp Duties

These exemptions are applied by reference to the relevant sections of, respectively the Taxes Consolidation Act 1997, the Capital Acquisitions Tax Consolidation Act 2003 or the 1999 Stamp Duties Consolidation Act. The reference to income tax does not mean that employees of charities are exempt from paying personal income tax, which in Ireland is broadly levied as the PAYE, PRSI, and USC (Universal Social Charge) taxes. Rather if a charity earns rent or profits from, for example the letting out of a building, those revenues are not subject to income tax, provided they are applied to charitable purposes.

In addition to permitting exemptions from the obligation to pay tax, Section 848A of the Taxes Consolidation Act 1997 permits individuals who make a donation to eligible charities to write that donation off against tax, provided it is in excess of €250 per annum. Typically, charities indirectly benefit from this tax relief by encouraging those who make such donation to sign over the benefit of the tax relief to the charity.

As of May 2015, the Revenue Commissioners list 8,350 bodies as enjoying charitable tax-exempt status.

## **2. Do charities/tax laws and regulation permit news organizations to be charities/tax exempt organizations that can received tax-deductible gifts?**

Irish legislation does not overtly identify news organizations as potential candidates for charity/tax exempt status. However, in theory, it appears that the educational, informational and democratic functions performed by Irish news media should allow such organizations to be considered seriously as applicants for charity status.

The abstract definition of a charity does not explicitly extend to news or media organizations. Nor does the Taxes Consolidation Act extend any special status to

news media. For instance, several religious media organizations have successfully applied for charitable status, but in all of these cases, this has been on the basis of promoting religion rather than promoting public good.

Following Richard L. Schmalbeck's argument in United States, a newspaper could play a role in advancing education.<sup>47</sup> A newspaper could also fulfil some of the criteria exemplifying purposes that are "of benefit to the community," such as advancing the arts, culture, heritage or sciences (by giving exposure to these communities) or promoting the full participation of disadvantaged groups in society. For instance, the support for a change in the definition of marriage to include same-sex couples, expressed in the editorials of virtually every Irish newspaper in the run-up to the Referendum on the subject on June 9 2015 could be regarded as having constituted support for the position of a disadvantaged group in society.

However, no major Irish news organization has invoked such arguments in the pursuit of acquiring a charitable status. It is worth acknowledging that Irish media have invoked similar rationales in other contexts. For example, NewsBrands Ireland, the lobby group for Irish print newspapers, campaigned for a reduction in the VAT rate applied to newspapers since the early 1980s. Until 2011, newspapers were subject to a 13.5% VAT rate having secured a drop from the standard 23% rate in 1985. Since 2011, however, print newspapers have been taxed at a reduced VAT rate of 9%, although digital editions are still taxed at 23% owing to a European Court decision that ebooks and epapers should be regarded (and taxed as) electronically supplied services. NewsBrands have continued to lobby for a further VAT reduction to 0% citing practice in the UK and other EU member states. NewsBrands overtly and consistently invoked the educational and socio-political contribution of newspapers as the basis for their claim, describing their product as "an educational tool" which is "essential to a healthy democracy."<sup>48</sup> As another example, in February 2012, Alan Crosbie then Chairman of Thomas Crosbie Holdings, which at the time was the third largest indigenous media group in Ireland, said that newspapers should be given access to a share of the broadcast license fee since they played "an important social role in the provision of reliable information" adding that "Public Service is not just for RTE [the Irish PSB] but for every media organization publishing information for the public good."<sup>49</sup>

It should also be noted that between 1987 and 2014, Section 481 of the 1997 Taxes Consolidation Act (originally Section 35 of the 1987 Finance Act), allowed corporate and private individuals to write off investments in film and television productions against their corporation tax and income tax bills. However, the details of the scheme made it impossible to use the tax break to support television news production and the bulk of such investment went towards

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<sup>47</sup> Richard Schmalbeck, *Financing the American Newspaper in the Twenty-First Century*, *Vermont Law Review* Vol. 35, No. 1, 2010, pp. 251-272.

<sup>48</sup> Newsbrands, 999: An Emergency Call to the Committee on Finance, Public Expenditure and Reform on Budget 2015, Dublin: Newsbrands, p. 3.

<sup>49</sup> Irish Examiner, Give Part of Broadcast Funds to Print Media, 7 February 2012, p 7.

supporting the production of fiction content.<sup>50</sup> Since January 2015, the scheme has been radically revised to become a tax credit-based rather than investor-led model.

*What is the rationale for or against such designation?*

Since extending a designation as charities to media organizations has not been considered in Ireland, there is no officially stated rationale for or against such a designation. Despite this one can point to a set of assumptions that militate against such a designation. Key amongst these has been the implicit but widespread acceptance in Ireland of what Dwayne Winseck has characterized as the advertising for journalism quid pro quo.<sup>51</sup> Thus at least until recently it has been unproblematically accepted in Ireland that the status of (in particular print) media as commercial businesses is the primary basis upon which they have been able to assert and maintain their editorial independence. The idea that a heavy reliance on advertising revenue might undermine this has not been the subject of much public debate. This idea was briefly problematized by the establishment of the national broadcaster RTE, originally as “2RN” in 1926,<sup>52</sup> which, although officially funded by advertising, a license fee, and - initially - an import duty on radio set sales, in practice almost entirely eschewed ad revenue until the early 1930s. The avoidance of advertising was motivated by a concern that it might demand an overly populist approach to scheduling. In other words, there was some consciousness that broadcasting might aspire to a higher public role than mere entertainment and that this might be threatened by a reliance on precisely the commercial forces which print media have long understood as the basis on which their editorial independence is guaranteed. However, having been deprived of import duty revenues in 1933, RTE was subsequently forced to look to advertising revenue to make up the shortfall. By the end of the 1990s, 60% of RTE’s revenues were ad-based, although as of 2013 this has fallen to 44%.<sup>53</sup>

RTE’s funding structures notwithstanding, most commercial Irish media organizations self-identify as businesses, competing in a marketplace, and exhibit an angst at the idea that they might be regarded as charities and institutions requiring any kind of public subsidy. Thus, although the Irish Times has given some consideration to the idea of a public good-based status, akin to charitable status, their MD emphasizes that this debate would have to proceed within a discourse of foundation rather charity status.<sup>54</sup>

There are also two recent public controversies that might militate against any effort to gain the designation of Irish news organization as a charity. The first involves charges and investigation of Ireland’s most prominent media owner, Denis O’Brien, whose media outlets account for the second largest share of media

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<sup>50</sup> A similar situation exists in the UK under its tax laws.

<sup>51</sup> Dwayne Winseck. *The Political Economies of Media and the Transformation of the Global Media Industries* in Dwayne Winseck and Dal Yong Jin (Eds.) *The Political Economies of Media*, London: Bloomsbury, 2011, p. 21.

<sup>52</sup> John Horgan, *Irish Media: A Critical History Since 1922*, London: Routledge, 2002, p. 18.

<sup>53</sup> RTE, *Annual Report and Group Financial Statements 2013*, Dublin: RTE, p. 94.

<sup>54</sup> Personal Interview with Liam Kavanagh, Managing Director, *Irish Times*, 17 June 2015.

voices after the public service broadcaster, RTE. O'Brien has been a controversial figure for the past decade. It would be politically difficult to introduce media as charity designation because such a change might be interpreted as designed to aid O'Brien, even if it also benefitted other media organizations. The second controversy relates to the finances of high profile Irish charities and the remuneration enjoyed by their senior staff. The controversy had negative consequences for the charity sector as a whole in Ireland as other charities and found it harder to convince ordinary citizens to continue making donations.

In sum, the socio-political environment following the breaking of these scandals mitigates against public and political support for tax advantages for media as charities

### **3. Do any procedural hindrances exist?**

The most significant procedural difficulty relating to acquiring charitable and tax exempt status for *any* organization (media or otherwise) lies in the division of responsibility for these areas between the Charities Regulatory Authority and the Revenue Commissioners Charities Section. Thus, although an organization may be recognized as a charity by the CRA, they may be (and often are) nonetheless denied tax exempt status by the Revenue Commissioners. In other words, there is a lack of certainty over the operational definition of charity.

The first procedural hindrance relates to the division of responsibility for determining charitable status across the Revenue Commissioners and the Charities Regulatory Authority. Since October 2014 the Charities Regulatory Authority has had responsibility for maintaining the list of registered charities. In other words, media organizations seeking charitable status must go through the procedures associated with being recognized and registered as a charity by the CRA and then must separately seek tax-exempt status on the basis of being a charity from the Revenue Commissioners. However, the CRA-designation as a charity does not automatically confer tax exempt status upon an organization: the power to make that determination remains with the Revenue Commissioners. In interview, the Revenue Commissioners Charity Section did concede that if the CRA were to confer charity status upon an organization, the Revenue would have to take account of that in making their own determination as regards tax exemption for that organization. Nonetheless, in practice, it is not uncommon for the Revenue Commissioners to refuse tax exempt status to organizations regarded as charities by the CRA.

The second procedural hindrance relates to the Revenue Commissioners' case-by-case approach to applications for tax exemption on the basis of charitable status which creates a degree of inconsistency in the awarding of charity tax status. In other words, it is not the case that a potential applicant for charity status can simply look at a clearly-defined legal characteristics of a charity, identify how/if they relate to their organization in their application and then confidently wait for charitable status (and associated tax status) to be awarded. Although the performance of activities which are "beneficial to the community" (as per Section 3 of the Charities Act) potentially includes wide range of activities, in practice

the Revenue Commissioners seek to avoid an over-generalized interpretation of what beneficial activities might attract charitable status. As a result, assessments by the Revenue Commissioners of applications for charity-based tax-exempt status tend to focus on the very particular characteristics of the applicant organization. This may mean that different organizations which appear broadly similar, may not be identically assessed by the Revenue Commissioners and may experience quite different outcomes. This case-by-case approach clearly makes it difficult for applicants to have a sense of whether they are likely to be granted charitable tax-exempt status in advance of the assessment of their application.

To illustrate the particular issues this raises with regard to media organizations, consider two national media applicants for charity status. Applicant A may be seeking to establish a religious-themed radio station. Applicant B may be seeking to establish a community-radio station. In both cases, the notional starting point for the Revenue Commissioners' assessment, namely the "Governing Instrument" (e.g. Articles of Association) of the applicant organizations, makes reference to criteria for charitable status included in Section 3 of the Charity Act, (respectively the "advancement of religion" and "benefitting the community"). On paper therefore, both applicants would appear to meet the criteria for charitable status. In practice, however, the religion-themed radio station is more likely to be awarded charitable status because they clearly fall under one of the stated criteria for charitable status. By contrast, because the community station falls under the more nebulous heading of "benefitting the community" it is less likely to be awarded charitable status. Ciaran Murray, an advocate for community media in Ireland who works with NEAR FM community radio, argues that, in practice, the Revenue Commissioners have been extremely reluctant to favorably consider applications from community stations for tax exempt charity status.<sup>55</sup> The Revenue Commissioner argument has been that such stations do not clearly fall under one of the four charitable purposes identified above. Although community stations have argued that their primary object is community development, using broadcasting as a means to an end, Murray argues that the Revenue Commissioners have interpreted their primary object as being to broadcast. Furthermore, even if it could reasonably be argued that Community Stations fall under the "benefit to the community" rubric, the Commissioners state that

It should be noted that not all purposes of benefit to the community would be considered a charitable purpose. In examining an application for tax exemption the Charities Section will examine the case with regard to the objects, the actual activity of the applicant body and with regard to established charity case law.<sup>56</sup>

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<sup>55</sup> Personal Interview with Ciaran Murray, NEAR FM, June 17, 2015.

<sup>56</sup> <http://www.revenue.ie/en/business/faqs-charities.html#section1>



In other words, the Revenue Commissioners retain a large degree of discretion as to what constitutes a charity for the purposes of tax exemption and to some extent, the absence of prior examples of media as charities (see below) means that there is little in the way of charity case law precedent that might be cited as supporting a claim by community media for such status.

This discretion inevitably leads to inconsistencies: one interviewee (Turlough Mullen an expert on charity law who works with the Irish legal firm Grant Thornton) noted that the Revenue Commissioners refused to accord tax exempt status to both Amnesty International (Ireland) and the National Women's Council on that grounds that - their charitable/public good activities notwithstanding - the Commissioners saw both as primarily engaged in political lobbying which is not one of the four defined charitable purposes. Against that, religious lobby groups in Ireland such as the Iona Institute (a Catholic think tank) are accorded charitable status by the Revenue Commissioners because despite their overt engagement in political lobbying, they are primarily regarded as promoting the advancement of religion.

In a similar vein, the manner in which the Revenue Commissioners take into account the extent to which applicants for charitable status engage in commercial activities points to a certain inconsistency. The Revenue Commissioners must take into account the extent to which the organization is of a commercial nature and the extent to which it engages in commercial activities. A charity must be set up so as to ensure that it does not produce profits/dividends for individuals but rather can only earn monies which are to be spent on charitable activities. This does not prohibit such charities from engaging in commercial activities but as a rule the Revenue Commissioners are at pains to ensure that those commercial activities do not interfere with the operations of purely commercial operators. Thus, for example, charity shops are typically expected to limit their retail activities to the sale of second hand goods, thus avoiding direct competition with mainstream commercial retailers. This appears to create an insurmountable obstacle to the designation of mainstream Irish news organizations as charities: precisely their self-identification as commercial institutions noted above. Given this, unless news organizations as a single class were to be designated as akin to charitable entities, it is hard to see how one news organization could be so designated whilst others continued to operate on a purely commercial basis. That said, in practice the case-by-case approach of the Revenue Commissioners appears to allow some scope for leeway on the question of commercial activities. Spirit FM, a religious broadcaster with charity status (see below), though mainly (80% plus) reliant on charitable donations also sells advertising time for products without any religious connection. Even if Spirit's negligible market share limits the impact of such advertising it nonetheless clearly constitutes competition with the sales activities of other commercial broadcasters.

#### **4. Are there charitable/tax exempt news organizations in the country?**

There are a small number of charitable/tax exempt news organizations in Ireland. These tend to be religious in nature. Thus although non-religious media

organizations have sought such status (specifically community media – see section above) they have – without exception- been unsuccessful.

The Broadcasting Authority of Ireland-licensed Spirit Radio is a Christian Radio station. These two stations are available nationwide via medium wave transmission and as an FM station in Dublin, Limerick, Cork, Galway, and Waterford.<sup>57</sup> The station appeals for donations as a charity but also sells advertising time.<sup>58</sup> According to its website, direct contributions account for 80% of the station's total income; 20% comes from advertising revenue. Both sources of revenue are tax-exempt: the accounts filed at the Companies Records Office do not record any tax payments.<sup>59</sup>

The Revenue Commissioners also list Religious News Network Ltd. The Companies Records Office records this title as the original name of a company, which since 2006 has traded as Soul Waves Radio Limited. The company is not a broadcaster in its own right but produces religious content for local and community stations, including around Ireland. Its financial activities are limited in scale. Although it recorded a peak turnover of £UK112,268 in 2008 (FAME database), this has since declined to £UK28,703 for 2013. However, this belies its presence on the airwaves: it contributes content to 22 local and community broadcasters across Ireland on a weekly basis, typically producing 30 to 60 minute religious-themed shows directly addressing local audiences.

St Brigid's Media Limited, better known as Eternal Word Television Network (EWTN), a Catholic-themed US-based producer of religious programming, is another charitable/tax exempt news organization. EWTN is available to Irish viewers as part of basic subscription packages provided to cable and satellite distributors of television in Ireland (i.e. the Liberty Global-owned UPC and News International's Sky Television). Although the content is largely constituted by material originally produced for the US market, some local content is included in the schedule. The Irish website for EWTN overtly seeks charitable donations to fund the operation of the channel in Ireland, suggesting that it is provided free of charge to television distributors. EWTN is a growing operation in Ireland, its turnover increasing from £UK79,000 in 2007 to £UK247,000 in 2013. It earned £UK44,731 in profits in 2013 all of which was tax exempt.

*The Irish Times*, the second best-selling daily paper in Ireland, is not a charity but is mentioned here because it is widely (mis)understood as having such

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<sup>57</sup> Spirit is not captured within the Joint National Listenership Research surveys, which are carried out in Ireland by Ipsos MRBI. Thus although Spirit cite research suggesting that within the four largest urban areas of Ireland, in the region of 204,000 people listen to the station each week, it is not clear how this translates in an audience share. (Anecdotally, it seems unlikely that the station exceeds a 1% national audience share.) However, the station is a financially significant operation, its turnover averaging approximately £UK380,000 per annum in the period from 2011 to 2014.

<sup>58</sup> The station broadcasts news and current affairs hourly (which although following mainstream news value norms also includes a relatively high proportion of religiously-themed content) and including current affairs content within magazine-style shows.

<sup>59</sup> FAME Database – Spirit FM Accounts 2013 Filing.

status. Though established as a commercial operation in 1859, in 1974, the Irish Times was restructured as a Trust. The trust acts as a holding company for the Assets associated with the newspaper, including physical assets such the printing press but also intellectual property such as the masthead. The Articles of Association of the Trust means that *The Irish Times* cannot pay dividends, thus the directors of the newspaper cannot profit from the newspaper. Any profits made must be reinvested back into the operations of the newspaper. Thus although *The Irish Times* is a not-for-profit newspaper, it is not a charity and the paper does not have charitable status.

The perception amongst elements of the Irish public that the newspaper seems partially driven by the existence of the Irish Times Foundation, a subsidiary set up at the time of the establishment of the Trust in 1974. The Articles of the Foundation clearly describe it as a charity. However, according to current MD, Liam Kavanagh, the existence of the Foundation is a vehicle which, in the event that the paper was ever wound up, could be used to receive the value of the assets of the paper (which would then be disposed of for charitable purposes).<sup>60</sup>

Finally, Ireland's community broadcasting sector is constituted by 27 geographical community and community of interest of radio and television stations licensed by the Broadcasting Authority of Ireland, such as Spirit FM. These organizations are not-for-profit operations and rely on voluntary labor and typically 1-2 paid staff. Although they are not barred from accepting commercial revenues, the broadcast regulator strongly recommends that this should not account for more than 50% of their total revenues. As in other countries community broadcasters devote a significant amount of their activity to fund-raising. However, although they have sought it they do not enjoy charitable status and donations to such stations do not attract tax-exempt status for benefactors.

#### **5. Are there news organizations that are not charities or tax exempt that are able to receive gifts/grants through some other structures or means?**

The 2003 Broadcasting Funding Act created a contestable fund for broadcast production known as the Sound and Vision fund which allows *all* broadcasters on the island of Ireland to bid for funds to produce public service content. This cannot be regarded as a gift, but might be considered as a grant because it is non-market funding. The 2003 Act top sliced 5% of television license fee revenues (7.5% since 2009) and placed them into a fund administered by the broadcast regulator, the Broadcasting Authority of Ireland. The fund provides up to 90% of the budget for projects from independent producers to produce programming which will be broadcast free-to-air on Irish channels.

The scheme lists its primary objective as being the production of 'high-quality television and sound broadcasting programs based on Irish culture, heritage and experience.' The other objectives of Sound and Vision have been to support Irish language production; projects which would not otherwise be supported on a

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<sup>60</sup> Personal Interview with Liam Kavanagh, Managing Director, *Irish Times*, 17 June 2015.

purely market basis; diversity of Irish culture and heritage; as well as local and Community Broadcasting.

The success of the fund has been discussed elsewhere,<sup>61</sup> but is included here because its introduction has promoted some reflection on the relationship between commercial media and state funding. The key characteristic of the scheme is the manner in which it directly funds the production of public service content rather than financing the Public Service Broadcasting institution. Thus public and private broadcasters compete for funds to produce specific programs of an overtly public service nature. This has prompted the question of whether such funds could also be made available for non-broadcast media organizations which identify, for example, newspaper publishing as constituting public service content production. Alan Crosbie's 2012 argument (noted above) that the broadcast license fee should be made available to newspapers exemplifies this.<sup>62</sup> In this context, it would not be a leap to argue that permitting Irish media to acquire charitable status would constitute a recognition by the State of the public service function performed by Irish news media.

#### **6. Have recent efforts been made to permit newspapers, digital media, and other media to become charities? By whom? With what outcomes?**

There have been no successful recent efforts made which would allow newspapers, digital media, and other media to become charities. However, in 2008, the Irish community broadcasting sector did make a concerted bid for such status.

Community broadcasters rely on donations from listeners for a significant proportion of their income. Permitting such benefactors to write off a donation against tax would create a further incentive to provide such financial support. According to Turlough Mullen, who acted as an advisor to CRAOL, the umbrella group for community broadcasters in Ireland, there was reason to believe that the Corporate Social Responsibility objectives of several of the new media firms which have headquartered in Dublin in the past decade – including Google or Facebook – might have encouraged them to make donations to community media – provided such donations attracted tax exempt status.<sup>63</sup> In 2008 a number of stations changed their legal status from "Co-operatives" to "Co-operatives with Charitable Rules" in the hope that this would allow them to make a case for charitable status to the Irish Revenue Commissioners. However, although the Revenue Commissioners accepted that the training element of Community Broadcasting met the education criteria for charitable status, the Commissioners argued that the main activity of Community stations was broadcasting, an activity not regarded as a charitable purpose and thus refused to extend tax-exempt status to the Community stations.

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<sup>61</sup> Roddy Flynn. Public Service Broadcasting Beyond Public Service Broadcasters, *International Journal of Digital Television*, Vol. 6, No. 2 (2015).

<sup>62</sup> Irish Examiner, Give Part of Broadcast Funds to Print Media, 7 February 2012, p. 7.

<sup>63</sup> Personal interview with Turlough Mullen June 16 2015. The basis for this belief is not clear – it appears that CRAOL made a number of informal approaches to some of these potential benefactors – and that these resulted in positive responses but no specific commitments.

It should be stressed that this bid for charitable status occurred before the passage of the 2009 Charities Act. The fourth category of charitable purpose defined in that Act - “benefits to the community” - clearly relates to the work of community broadcasters given that most primarily self-identify as community development institutions which use broadcasting as their means to that end. This would appear to support the idea that such broadcasters could reasonably make claim for charitable status. The failure to do so appears to be the result of limited resourcing of community stations coupled with inertia, following the rebuff to their original bid.

Although mainstream news organizations have been less active in this regard, they are not entirely lacking in opinions in the subject. In response to the current research, Tom Crosbie, the Chairman of Landmark Media (formerly Thomas Crosbie Holdings) the third largest media group in Ireland, stressed that neither Landmark nor Thomas Crosbie Holdings had ever contemplated charity status and expressed doubt at the idea that such a status could address the consequences of the increasingly difficult market conditions Landmark operates within.<sup>64</sup>

*The Irish Times* has previously contemplated the idea of charity status, but not sought it. Since 1997, the paper, along with other newspapers, has availed of resources provided by the International Consortium of Investigative Journalists, including recently the LuxLeaks resource, and, could be said to have indirectly benefitted from philanthropic donations insofar as the ICIJ is funded by charitable/philanthropic foundations such as George Soros’s Open Society Foundation. Similar funding has supported news activities for both not-for-profit and commercial news enterprises in other countries as well.

Liam Kavanagh, Managing Director of *The Irish Times*, says the increasing instability of traditional funding sources, such as advertising and circulation revenue, has encouraged the newspaper to begin to think about alternate or additional sources of funding. Kavanagh cited the investigative reporting unit headed by Maggie O’Kane at *The Guardian* which received funding from the Humanity United Philanthropic Foundation in 2014 to conduct research and reporting on slavery in the Thai Seafood industry. Thus the *Times* is considering similar approaches, possibly via the Irish Times Foundation, for funding specific investigations whereby funding from philanthropic organizations would not be given to the *Times* as an organization, but would be targeted on particular, finite pieces of research. This might be achieved by creating a specific unit within the newspaper for such work.

## **7. What do tax authorities, parliamentarians/legislators, and media personnel think about charitable status for news organizations?**

Policy-makers and the Revenue Commissioners are ambivalent regarding the idea of charitable status for news organizations. This attitude does not stem from

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<sup>64</sup> Personal communication with Tom Crosbie, 25 June, 2015.

any fundamental philosophical objection to the idea of media as charities. Policy-makers and the Revenue Commissioners accept the notion that media play a vital function in facilitating public discourse and the existence of a public sphere; they also show willingness to explore the idea that that public good function be financially supported by active direct state funding or passive tax exemption means.<sup>65</sup> The ambivalence relates to the definitional difficulties of creating a workable regulatory regime for media in this context. More specifically, how would such a status be defined in such a way as to clearly demarcate the status of, for example, a national daily and that of a content aggregator or Google?

Notwithstanding the fact that news organizations like *The Irish Times* have contemplated charity/foundation status and are turning to charities to gain support for some journalism, most Irish news media are not comfortable with the idea that a newspaper or broadcaster might receive charitable status or be associated with such a status. The CEO of Landmark media, Tom Crosbie argued that their flagship title, the *Irish Examiner*, “prided itself in providing balanced, fair and objective reporting of facts and views without influence from government or other business interests.”<sup>66</sup> For Crosbie, charity status could undermine that reputation because it might mean that the newspaper would be indirectly subject to government influence via the Charities Regulatory Authority since the latter body would be able to determine whether or not the newspaper was assigned charity status. Landmark Media’s response concedes that the topic has not been the subject of much discussion, professing not to understand how charitable status would improve the position of, for example, their flagship title the *Irish Examiner*.

Landmark Media’s outlook reflects that of *The Irish Times* towards the term charity, which Irish Times Managing Director Liam Kavanagh suggests might be interpreted as suggesting that the paper would no longer be regarded as a real business.<sup>67</sup> Although the paper acknowledges that contemplating various modes of accessing philanthropic support will be increasingly on the agenda for discussion at the paper, the preference is that this would be achieved under the rubric of a foundation rather than as a charity.

## **8. How does the presence or lack of charitable status affecting development of not-for-profit news organizations?**

Since there has not been meaningful public debate in Ireland about the development of not-for-profit news organizations, there is no basis on which to address this question.

### **Summary of the contemporary situation**

Ireland has few not-for-profit media outside community broadcasting and there is no significant impetus to alter charity and tax laws to make it easier for news

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<sup>65</sup> Personal interviews with Richard Browne, Department of Communications, Energy and Natural Resources, 19 June 2015 and Liam Keogh, Charities Section, the Revenue Commissioners, 17 June 2015.

<sup>66</sup> Personal communication with Tom Crosbie, 25 June 2015.

<sup>67</sup> Personal interview with Liam Kavanagh, 17 June 2015.

enterprises to achieve such status. Indeed, the political climate and perceptions of the media industry today would make it difficult to pursue such policies at this time.



## The United Kingdom: The impact of charity and tax law/regulation on not-for-profit news organizations

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There is no rule against journalism and news being funded charitably in England and Wales but there are very few examples of charities running journalism and news services as part of their central activities. This was recognized in 2012 by the House of Lords select committee on communication, which recommended that the then government re-consider reform of charity law in relation to the funding of investigative journalism, and for the Charity Commission to provide guidelines and clarity in this area.<sup>69</sup> However, there has been no subsequent reform or further public consultation.

Despite this legal context, there is evidence of journalism and news being produced within charities and of journalism and news being funded by charities. This chapter sets out three main ways in which charitable funding is used for producing journalism: 1. Charity directly produces journalism as a core activity; 2. Charity owns or controls non-charitable journalism-producing organization; and 3. Non-charitable journalism-producing organizations and individuals receive some support from charities and charitable individuals. More broadly, there are numerous charities that support media education and training, and charities which engage in some journalistic type activity but not as a central objective.

- There is no special tax and charity regime for producing news and journalism in England and Wales, although newspapers and magazines are zero-rated for VAT (for newspaper and magazine copy and subscription sales);
- It can be difficult for a journalism / news organization to get charitable status because of the legal framework that requires charities to have charitable purpose/s that fit within the charitable descriptions in the Charities Act 2011 and to show the public benefit of this purpose;
- The main benefits of charitable status are that it provides tax relief, it would help volunteers donate their time through employee schemes, and

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<sup>68</sup> With thanks to the people consulted for this report and previous research at the University of Westminster in 2013-14. Particular thanks are owed to Professor Steven Barnett, who led the earlier research and Tom Murdoch, partner at Stone King LLP. Thank you to Dr Richard Danbury, University of Cambridge, and Dr Jonathan Heawood, Impress, for their comments on an earlier draft. Additionally, I am grateful to individuals from organizations including the Joseph Rowntree Reform Trust, Joseph Rowntree Foundation, Bates Wells Braithwaite LLP, Nesta, TalkAboutLocal, Guardian Media Group, openDemocracy, Index on Censorship, Full Fact, China Dialogue, The Bureau of Investigative Journalism, and the Carnegie UK Trust. However, all errors and omissions remain my own.

<sup>69</sup> House of Lords, *House of Lords Communications Committee - Third Report - The future of investigative journalism*, 2012 [online], House of Lords. Available at: <<http://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/25602.htm>> [Accessed 15 Sep. 2015].



- by enhancing an organization's reputation and ensuring standards of conduct, it attracts more philanthropic and public donations, and would allow bequests and legacies;
- There are also disadvantages of having charitable status, such as the limitations on political activity:<sup>70</sup> it would not be suitable for all types of journalism and news organizations to be funded charitably;
  - There is no major national news organization which has charitable status but there is evidence of journalistic and news producing activity being supported by charities in the UK;
  - The coalition government (2010-15) was disinclined to reform the legal framework despite recommendations by a parliamentary committee that it should do so;
  - More flexibility within a controlled regime would allow the growth of news and journalism organizations which are difficult to sustain commercially, particularly those doing investigative and local journalism;
  - A new model of funding could be particularly suited to community journalism to fill the growing "democratic deficit" of local news.

## 1. What charity and tax laws and regulations govern the granting of charitable status?

In England and Wales, charity law is based on case and statutory law. The Charity Commission is the regulator and registrar for charities in England and Wales. An organization cannot be a charity in England and Wales if it is subject to another country's jurisdiction, including Scotland, Northern Ireland, the Isle of Man or the Channel Islands. Four main types of charity structure include: charitable incorporated organization (CIO); charitable company (limited by guarantee); unincorporated association; and trust.<sup>71</sup>

To be a charity in England and Wales, an organization must satisfy the definition of a charity in the Charities Act. The main piece of legislation is the Charities Act 2011, which consolidates existing charities legislation into a single Act of Parliament. According to the government, "the Act updates the text and simplifies the structure of the existing legislation, but it does not change the existing law or introduce new policy."<sup>72</sup>

The following information is taken from the government's guidance on what constitutes a charity.<sup>73</sup> The Charity Commission's guidance is not law but does illustrate how a regulator interprets case law and legislation.

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<sup>70</sup> This issue also is seen in the US, where unsuccessful efforts to remove the limitation for news organizations recently occurred. See US chapter.

<sup>71</sup> Gov.uk, *Charity types: how to choose a structure (CC22a) - Detailed guidance*. 2014 [online] Gov.uk. Available at: <<https://www.gov.uk/guidance/charity-types-how-to-choose-a-structure>> [Accessed 17 Oct. 2015].

<sup>72</sup> Gov.uk, *Press Release: Charities Act 2011*. [online] Cabinet Office. Available at: <<https://www.gov.uk/government/news/charities-act-2011>> [Accessed 15 Sep. 2015].

<sup>73</sup> Charity Commission, *What makes a charity (CC4)*. 2013 [online] Gov.uk. Available at: <<https://www.gov.uk/government/publications/what-makes-a-charity-cc4/what-makes-a-charity-cc4>> [Accessed 15 Sep. 2015].

The Charities Act specifies that a charity is an institution which:

- is established for charitable purposes only and
- is subject to the control of the High Court's charity law jurisdiction

A purpose is what a charity is set up to achieve and is usually set out in an objects clause of the charity's governing document, which creates a charity and states how it should be run. It is a legal requirement that a charitable organization must have charitable purposes only. It cannot have some purposes that are charitable and some that are not.

To be a charitable purpose (as defined by various descriptions in the Charities Act) it must:

- fall within the descriptions of purposes in the Charities Act and
- be for the public benefit

To be charitable, a purpose must satisfy both of these criteria. The purpose must be certain so that, if necessary, it could be enforced by the court. A purpose cannot lack certainty; it needs to be clear that it falls within one or more of the descriptions.

If a purpose lacks certainty it cannot be charitable because it will not be clear that it falls within one or more of the descriptions of purpose, or is for the public benefit.

Additionally, an organization's purpose cannot be charitable if it is a political purpose, unlawful or against public policy or intended to serve a non-charitable purpose.

The "descriptions of purposes" is a list of broad headings that a purpose must fall under to be a charitable purpose. There are 12 specific descriptions of purposes in the Charities Act 2011, and a 13<sup>th</sup> description of "any other charitable purposes," which "includes any charitable purpose not covered by the other descriptions of purposes and any new charitable purposes that may be recognized in the future as being similar to another charitable purpose".

#### *Descriptions of purposes*

1. The prevention or relief of poverty
2. The advancement of education
3. The advancement of religion
4. The advancement of health or the saving of lives
5. The advancement of citizenship or community development
6. The advancement of the arts, culture, heritage or science
7. The advancement of amateur sport

8. The advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity
9. The advancement of environmental protection or improvement
10. The relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage
11. The advancement of animal welfare
12. The promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services
13. Any other charitable purposes

To be charitable an organization's purpose must also be "for the public benefit." There are two aspects of public benefit:

1. The "benefit aspect": to satisfy the "benefit aspect" of public benefit:
  - a. a purpose must be beneficial
  - b. any detriment or harm that results from the purpose must not outweigh the benefit
2. The "public aspect": To satisfy the "public aspect" of public benefit the purpose must:
  - a. benefit the public in general, or a sufficient section of the public
  - b. not give rise to more than incidental personal benefit

In general, for a purpose to be "for the public benefit" it must satisfy both the "benefit" and "public" aspects.

For a purpose to be charitable it must be beneficial in a way that is identifiable and

- capable of being proved by evidence where necessary
- not based on personal views

It should always be possible to identify and describe how a charity's purpose is beneficial, whether or not that can be quantified or measured. If it cannot be shown that an organization's purpose is beneficial (based on evidence that a court could accept where necessary) then the purpose will not be charitable. A purpose cannot be a charitable purpose where any detriment or harm resulting from it outweighs the benefit. A charitable purpose may only confer personal benefits if these are incidental to carrying out the purpose. Further guidance on the definitions and application of the law are given in the Commission's guidance on public benefit.<sup>74</sup>

Where it is not clear that a purpose is beneficial, the commission may need to ask for evidence of this. For example, when the Bureau of Investigative Journalism applied to register as a charity (unsuccessfully), the Charity Commission said the application had "not presented any evidence to show that

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<sup>74</sup> Charity Commission, *Public benefit: the public benefit requirement*. 2013 [online] Gov.uk. Available at: <<https://www.gov.uk/government/publications/public-benefit-the-public-benefit-requirement-pb1/public-benefit-the-public-benefit-requirement>> [Accessed 15 Sep. 2015].

the company's input to investigative journalism translates into participation/engagement either in terms of decision making or participation in democratic processes".<sup>75</sup> It was clear that it was not enough to show that journalism has an effect, it was necessary to show that "the outcome results from engagement or participation or better informed decision making of citizens arising from the company's activities".<sup>76</sup>

### *Political activity restrictions*

A charity's purposes cannot be political; political campaigning, or political activity, must be undertaken by a charity only in the context of supporting the delivery of its charitable purposes. Unlike other forms of campaigning, it must not be the continuing and sole activity of the charity. For this reason, some UK-based organizations are divided into different legal entities to allow them to engage in non-charitable campaigning.

While charities can campaign for a change in the law, policy or decisions where such change would support the charity's purpose, and can campaign to ensure that existing laws are observed, a charity cannot exist for a political purpose. This would include any purpose directed at furthering the interests of any political party, or securing or opposing a change in the law, policy or decisions.

A charity must not give its support to any one political party: "It may express support for particular policies which will contribute to the delivery of its own charitable purposes so long as its independence is maintained, and perceptions of its independence are not adversely affected".<sup>77</sup>

There are specific restrictions for political activity during an election period,<sup>78</sup> with new rules introduced by the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act, 2014.<sup>79</sup>

### *New purposes*

A review published in 2001<sup>80</sup> described how the Charity Commission "recognises the need to apply the law in changing social circumstances, although it is only

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<sup>75</sup> In fact, the Bureau had not sought to put forward evidence of its impact in furthering citizenship.

<sup>76</sup> University of Westminster, *Discussion seminar: charitable initiatives for journalism and media - summary*. 2014 [online] Available at: <[http://www.mediaplurality.com/wp-content/uploads/2014/04/Charity-seminar-summary-June-2014\\_updated.pdf](http://www.mediaplurality.com/wp-content/uploads/2014/04/Charity-seminar-summary-June-2014_updated.pdf)> [Accessed 15 Sep. 2015].

<sup>77</sup> Charity Commission, *Speaking out: guidance on campaigning and political activity by charities*. 2008 [online] Gov.uk. Available at: <<https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities>> [Accessed 15 Sep. 2015].

<sup>78</sup> Charity Commission, *Charities, Elections and Referendums*. 2014 [online] Gov.uk. Available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/346058/elect.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/346058/elect.pdf)> [Accessed 15 Sep. 2015].

<sup>79</sup> The Electoral Commission, *Charities and Campaigning*. 2014 [online] Electoralcommission.org.uk. Available at: <[http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0010/165961/intro-campaigning-charities-npc.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/165961/intro-campaigning-charities-npc.pdf)> [Accessed 15 Sep. 2015].

able to determine which purposes are charitable in the way that the courts have done or in a way that [it] anticipate[s] the courts would do. In deciding whether novel purposes are charitable or not, [it] seek[s] to predict the decision the court would reach if it were to consider the matter". The Charity Commission "will take a constructive approach in adapting the concept of charity to meet constantly evolving social needs and new ideas through which those needs can be met".

### *Analysis*

While explicitly set out in legislation, the framework around charity law is progressive: what can be a charity is subject to change, as the economic and social context shifts. It can adapt to the contemporary values of society. The current descriptions of charitable purposes were determined by what the government at the time thought reflected the popular view. Demonstrating the public benefit of the charity's purpose is a crucial part of the application: it must be clearly shown and demonstrable through description, even if non-quantifiable or measurable.

### *Scotland and Northern Ireland*

This report primarily considers the situation in England and Wales; Scotland and Northern Ireland, as separate jurisdictions, have distinct regimes. According to Tom Murdoch, partner at Stone King LLP,<sup>81</sup> the principle difference in charity law between England and Wales, on the one hand, and Scotland, on the other, is that the test for charitable status in England and Wales is based exclusively upon whether an organization has charitable purposes; in Scotland, where charities are regulated by the Office for the Scottish Charities Regulator (OSCR), the test is based both upon the purposes of an organization *and* its activities. Whether the difference is significant in this context is debatable. It is possible that an organization such as an existing news-provider which could demonstrate that its activities comply with the necessary editorial standards and were not conducted for profit motive (or other private benefit) may have an advantage in Scotland for this reason, but in practice, the English Charity Commission looks at activities to construe true purposes (in cases of doubt), so it is likely any difference would arise from the different attitudes taken by the two regulators. Similar arguments would apply to the Northern Irish jurisdiction (and the Charity Commission for Northern Ireland). Tax treatment (by HMRC) is currently the same for charities on either side of the border.

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<sup>80</sup> Charity Commission, *Recognising New Charitable Purposes*. 2001 [online] Available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/358849/rr1atext.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358849/rr1atext.pdf)> [Accessed 8 Oct. 2015].

<sup>81</sup> In personal correspondence.

## 2. Do charities/tax laws and regulation permit news organizations to be charities/tax exempt organizations that can receive tax-deductible gifts?

There is no specific charitable regime for news organizations,<sup>82</sup> although there is some evidence of journalistic-type content being funded charitably in three different ways (see Q5).

### *Tax regime*

There is no specific tax regulation for news organizations, although newspapers and magazines are zero-rated for VAT (for newspaper and magazine copy and subscription sales). News organizations are subject to general tax regulation<sup>83</sup> for legal structures for businesses: business types include sole trader, limited company (limited by shares or by guarantee), “ordinary” business partnership, limited partnership and limited liability partnership, or unincorporated association. As well as these, a business that has social, charitable or community-based objectives could set up as a mutual (a co-operative or industrial and provident society) or community interest company (CIC).

There is no special mechanism for receiving tax-deductible gifts. However, non-charities – which could include media organizations - can receive charitable funding, which may be exempt from tax in certain circumstances (see Q6).

Although journalism is not described as a charitable purpose, journalistic activity could be covered by other purposes, such as the advancement of education or the advancement of citizenship or community development.

According to evidence given by a working party formed by the Charity Law Association to the House of Lords select committee on communications, “a commercial undertaking such as a conventional newspaper company is likely to be disqualified from charitable status because its underlying purpose is to generate a financial return for its owners, regardless of any beneficial effect on the public that might result from some of its work”.<sup>84</sup> In this scenario, a charity would not satisfy the “public benefit” requirement, in which a charity must not give rise to more than incidental personal benefit. This reason would not preclude a not-for-profit organization seeking charitable status.

A journalistic organization wishing to register as a charity would not be able to have political activity as its sole and central activity. It would only be able to campaign so far as this upheld its charitable purposes.

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<sup>82</sup> This report takes broad understanding of news to include journalistic-style media output, described as journalism producing, to allow for organizations which also engage in other types of activity.

<sup>83</sup> Gov.uk, *Business tax*. 2015 [online] Gov.uk. Available at: <<https://www.gov.uk/topic/business-tax>> [Accessed 15 Sep. 2015].

<sup>84</sup> Charity Law Association, *Written Evidence to House of Lords Select Committee on Communications Inquiry into the Future of Investigative Journalism*. 2011 [online]. Available at: <[http://charitylawassociation.org.uk/api/attachment/576?\\_output=binary](http://charitylawassociation.org.uk/api/attachment/576?_output=binary)> [Accessed 15 Sep. 2015].

Picard has set out three models for charitable/trust ownership and control of news organizations:

1. Charitable ownership and control, in which news organizations are owned and controlled by a charitable organization;
2. Charitably supported media, in which organizations receive support from charities and charitable individuals; and
3. Trust ownership and control, in which news organizations are owned or controlled by trust arrangements for purposes of supporting quality journalism.<sup>85</sup>

Setting to one side non-charitable funding and control (e.g. ownership by a non-charitable trust) these can be adapted as follows for this updated study of the UK landscape, in terms of journalism and journalism-producing, rather than news:

1. Charitable ownership and control, in which charity directly produces journalism as a core activity;
2. Charitable ownership and control, in which charity owns or controls a non-charitable journalism-producing organization;
3. Charitably supported journalism in which non-charitable journalism-producing organizations and individuals receive some support from charities and charitable individuals (recipient may be taxed on grants received).

Within all three categories there is variety in terms of the relationship with the charity and the level of support from a charity or charitable individual: a single charitable trust might be the predominant source of revenue for an organization, or alternatively an organization might rely on a hybrid model, deriving funds from multiple sources, both charitable and non-charitable.

#### *Previous research by RISJ*

David Levy and Robert G. Picard found in 2011 that “no independent UK foundation from outside the sector puts large enough amounts of funding into news production to sustain a news organization.”<sup>86</sup> Neil Fowler gave the country’s only charitable trust-owned newspaper as The Maidenhead Advertiser, and cited the example of Which?, a charity which owns and publishes (through its trading arm Which? Ltd), the consumer campaigning magazine Which? :

*...models exist, though not in the technically and legally pure form of the charity being the newspaper/magazine and vice versa. But in the eyes of*

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<sup>85</sup> Robert G. Picard, Charitable Ownership and Trusts in News Organisations. In: David .A.L. Levy and Robert G. Picard, eds., *Is there a better structure for the news providers? The potential in charitable and trust ownership*. Oxford: Reuters Institute for the Study of Journalism, 2011.

<sup>86</sup> David A. L. Levy and Robert G. Picard, *Is there a better structure for the news providers? The potential in charitable and trust ownership*. Oxford: Reuters Institute for the Study of Journalism, 2011, p.8.

*their publics these two examples [Maidenhead Advertiser and Which?] are charities.<sup>87</sup>*

Fowler also pointed to publications funded by charities such as universities, churches and schools. In their joint conclusion, Levy and Picard state that:

*the treatment of not-for-profit news organizations under UK charity law remains untested. One way to resolve this would be to create a test case of a local charitably operated newspaper or other news organization that set out to deliver a clear public benefit. Ideally that would then allow the charity law in this area to be clarified.<sup>88</sup>*

To some extent, this finding is supported by this research. There does not appear to be a not-for-profit UK-based news organization in the “technically and legally pure form of the charity being the newspaper/magazine and vice versa” (in Fowler’s terms). But if a more flexible definition of news is taken, which recognizes journalism-producing activity, then there are a number of projects that receive charitable funding through variants on models 1, 2 and 3. Specific examples, and potential case studies, will be set out below.

The distinction between a news organization and a journalism producing organization is not clearly delineated in English law. Typically, news producers enjoy certain privileges such as special access to official sources and places, such as the family courts, but other types of publishers might be able to use the same defenses as new organizations to defend a libel or privacy case, or protect a source. The distinction between the two has become more critical since the introduction of new legislation in 2013: news organizations (except broadcasters) are highly likely to be affected by a new system designed to incentivize membership of a recognized press regulator. A “relevant” multi-authored news publication is likely to be subject to a less favorable costs regime in libel and privacy claims, if it is not a member of a recognized regulator, whereas an organization producing journalism as part of a wider set of activities would probably be exempt.<sup>89</sup>

The significance for this report is that by including journalism producing organizations, as well as news organizations, we are considering a broader range of players than those typically thought of as the print, online and broadcasting press.

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<sup>87</sup> Neil Fowler, Regional Press Challenges Promote Calls for New Ownership Forms and Legal Bases. In: David A.L. Levy and Robert G. Picard, eds., 2011, op cit, p. 47

<sup>88</sup> Levy and Picard, 2011, op cit, p. 134.

<sup>89</sup> At the time of writing there was not a recognized regulator so the new costs regime for libel and privacy cases had not been triggered. Additionally, there is some disagreement and ambiguity as to which publishers which qualify as relevant. See H. Anthony, *Who Joins the Regulator? A report on the impact of the Crime and Courts Act on publishers*. 2014 [online] English PEN. Available at: <[http://www.englishpen.org/wp-content/uploads/2014/11/Who\\_joins\\_the\\_regulator\\_5\\_Nov\\_2014\\_English\\_PEN1.pdf](http://www.englishpen.org/wp-content/uploads/2014/11/Who_joins_the_regulator_5_Nov_2014_English_PEN1.pdf)> [Accessed 15 Sep. 2015].



### 3. What is the rationale for or against such designation?

The possibility of registering journalism organizations as charities has been discussed in a number of fora: in the 2011 Reuters Institute for the Study of Journalism report; by the House of Lords select committee on communication in its inquiry into investigative journalism in 2012; by an ad hoc group of journalists and lawyers that submitted written evidence to the Leveson Inquiry in 2012, and at a series of academic/industry seminars hosted by the University of Westminster's Arts and Humanities Research Council (AHRC) funded media power and plurality research project in 2013-14.<sup>90</sup> Before that, Lord Phillips of Sudbury, a founder of charity-specialist law firm Bates Wells Braithwaite attempted to establish an agreement with the Charity Commission that charitable status could be granted to regional and local newspapers (see correspondence reported by Fowler<sup>91</sup>). Materials covering these discussions are listed in the bibliography and discuss the likely rationale in more detail.

There is a persuasive argument that certain forms of public benefit journalism could be recognized under existing law, according to Tom Murdoch, partner at the charity-specialist law firm Stone King LLP. This next section on the rationale for recognition is based on his observations.

#### *Rationale for charitable recognition of public benefit journalism*

Charity law recognizes purposes *analogous* to public benefit journalism (as defined in Q4, below), in particular around building local community capacity and the dissemination of information which enables citizens to participate more fully in society. Local newspapers that operate in this way exist already, unsupported by charitable status. However, they are vulnerable to commercial pressures. There are areas of the UK in which there is no longer any local newspaper provision at all, which has been described as the “democratic deficit”.<sup>92</sup> Traditional profit-driven media ownership and funding models are not adequate for sustaining local news in an environment in which global, non-local content is provided free-of-charge by giants like Google, Twitter and Facebook.

This democratic deficit that occurs when communities do not receive sufficient local news underlines the public need served by community news providers. Recognizing certain forms of public benefit journalism as charitable and therefore opening up the possibility of new funding streams and charitable tax reliefs (and no need to generate dividends), could equip community news providers to more easily survive in the new environment, strengthen local communities and meet this important democratic need.

Equivalent arguments could be made in favor of forms of investigative journalism that serve a public interest. By and large, publication and broadcast of the fruits of investigative work depends upon commercial ownership models.

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<sup>90</sup> The author of this report was a research associate on this project

<sup>91</sup> Fowler, 2011. Op cit., pp. 46-47.

<sup>92</sup> Martin Moore, *Addressing the Democratic Deficit in Local News through Positive Plurality*. [online] Media Standards Trust. 2014. Available at: <<http://mediastandardstrust.org/wp-content/uploads/2014/10/Positive-Plurality-policy-paper-9-10-14.pdf>> [Accessed 17 Oct. 2015].

The effect on the organizations producing investigative journalism is that a story (or a course of investigation likely to lead to a story) must be commercially supported by advertising or sales revenue to justify the investment required. It is arguable that the public would be better served by investigative journalism that is less dependent upon the commercial viability of a story.

If a charitable funding or ownership model were available (with the benefits of charitable funding streams and tax reliefs), it is possible that producers of investigative journalism would be less vulnerable to the need to convert investigative output into sales, or attract advertisers. Many stories of legitimate public interest (for example, uncovering crime or misuse of public funds) do not have an immediate or obvious sale value (or none at all), despite the obvious public interest in their publication. Investigations of this type (and therefore the public interest in these stories) would therefore be better served by the availability of charitable funding or ownership structures.

#### *Rationale against charitable recognition of journalism*

There is limited discussion in the sources consulted for this report as to why journalism should not be recognized as charitable, but there is evidence of some concerns, which are discussed below.

The first concern is best described as skepticism about non-commercial and state-supported media (and concerns about state interference). This was reflected in the House of Lords debate following the publication of the committee's report; Lord Stoneham of Drogheda said he was "not convinced that the state should get involved in subsidising the industry", although he did not specifically refer to the recommendations for reforming the charitable framework.

Further concerns were alluded to by Baroness Garden of Frognal, Liberal Democrat peer, and at the time, Lords Spokesperson for the Department for Culture, Media and Sport, following publication of the House of Lords communication committee report.<sup>93</sup> She suggested that "some aspects of charity law may make it unsuitable for many aspects of investigative journalism". Without elaborating, she said that these reasons included: "that any new organization seeking charitable status would need to demonstrate public benefit, which is distinct from the concept of public interest, and that the constraints of charity law would also include a requirement for political impartiality".

The first seems to be a practical hindrance (see below) rather than a rationale against award of such status (and in fact, lawyers such as Stone King's Tom Murdoch believe that under certain conditions - such as a robust operating guidelines and a system of enforcement - there may be a basis for asserting that

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<sup>93</sup> Parliament.uk, *Daily Hansard 25 July 2012: Column GC305*. [online] Parliament.uk. Available at: <<http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120725-gc0001.htm#12072541000330>> [Accessed 15 Sep. 2015].

public interest closely coincides with the public benefit requirement in law). The second reason could be understood as a rationale against: that the political nature of journalism makes it unsuitable as a charitable activity. Indeed, many types of journalism would not comply with the requirement that a charity cannot have a purpose directed at furthering the interests of a political party, for example. However, this would only apply to politically partial forms of journalism. Advocates of charitably supported journalism suggest that this is not a valid argument against impartial and politically neutral journalism, subject to stringent standards and oversight.

Another possible rationale against charitable status for journalism is that journalistic activity generates commercial revenue for its owners or other third parties, which would breach the requirement that a charity must not give rise to more than incidental personal benefit. However, as with the previous reason against, the argument is based upon experience of the operation of commercially run newspaper companies; charitable providers would need to ensure they do not operate in this way.<sup>94</sup> Provided they can do so, this is not a rationale against the existence of charitable journalism.

A final point of consideration is the relationship between the charitable trustees and the producers of charitable journalism: can sufficient editorial autonomy be maintained? This could be discussed under either of the headings above; as a rationale for or against: proponents of charitable journalism have suggested that the structures could in fact help protect journalism from editorial interference. This discussion is, however, beyond the scope of this short report and warrants attention in future research.

### *Analysis*

Overall, there is a stronger case for these various rationales either for and against *particular types* of journalism. None of the individuals cited in the literature make a case for charitably funding *all* kinds of journalism and if a full case was made against charitable journalism per se, it could easily be challenged as a strawman argument.

## **4. Do any procedural hindrances exist?**

News/journalistic organizations are not actually prohibited from having charitable status. According to Tom Murdoch, forms of not-for-profit journalism which operate for the public benefit, to inform a community and according to robust editorial standards of non-bias, objectivity and reliability (“public benefit journalism”), could potentially be recognized as charitable under the existing law. The legal test which would need to be satisfied (and associated Charity Commission guidance) has already been set out above.

However, the existing framework makes it difficult for a journalistic organization to have charitable purpose/s that fit within the charitable descriptions in the Charities Act 2011 and to show the public benefit of this purpose. Obstacles that

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<sup>94</sup> News enterprises in other countries in this report face similar prohibitions or limitations on the amounts of commercial revenue they can receive as part of their activities.

would have to be overcome include the requirement that an applicant evidence the beneficial effect of journalistic activities on the public served; the need to demonstrate that news provision is impartial and objective; and the need to demonstrate that any third-party, private benefit is incidental to the public benefit served. Despite the difficulties in demonstrating this in practice, there are a wide variety of charities with purposes closely related to journalism, which are considered in Q5 (although not a national news or investigative journalism organization as such).

The discussions mentioned above revealed a number of procedural and substantive hindrances to a journalistic organization achieving direct charitable status, including:

- An over-burdensome registration demands and process for applicants;
- The fact that it is difficult to evidence and demonstrate public benefit as set out in the guidance. This was described by the Charity Law Association in its evidence to the House of Lords committee, with regard to investigative journalism:

*One of the distinctive difficulties for any investigative journalist is the uncertainty, when he or she sets out on a new project, of there being any beneficial outcome at the end of that project. Much painstaking work may be necessary before any useful results are achieved and it would be particularly difficult for a charity, whose funds may only be applied for charitable purposes, to commit itself to providing financial support for an investigation that might quite possibly disclose nothing of any benefit to the public. Charity law does permit trustees to take certain risks and to support projects whose intended outcomes are not guaranteed ... However, any decision to commit funds to investigative journalism would need to be justified by a reasonable expectation of a beneficial outcome.*

- Investigative journalism is not specifically included within the descriptions for charitable purposes, and it is not obvious where it would fit;
- To fulfill an educational purpose, information has to be capable of advancing knowledge and skill – simply providing information would not be charitable;
- The pursuit of a journalist's investigation is not charitable in itself;
- A charity must justify support of journalistic activity and show how it upholds its purpose/s;
- A charity cannot exist for a political purpose, so while a charity can engage in campaigning activity, it would not be able to have a purpose directed at furthering the interests of any political party, or securing or opposing a change in the law, policy or decisions. Unlike a non-charitable newspaper, a charitable journalistic organization would not be able to support any one

political party – there are specific restrictions for charities at the time of an election or referendum;<sup>95</sup>

- There may be cultural, as well as legal, factors to consider as well – as well as regulatory caution, there may be conservatism and caution on the part of charitable trustees and organizations in terms of developing this area of activity; and
- If charitable status were given to a newspaper, there would be ongoing duty on the trustees to check that it continues to fulfill its charitable purpose and does not compromise its articles and complies with the rules on political campaigning and public benefit.

Overall, the difficulties encountered when funding journalism charitably cannot be explained by the legislative framework and case law precedent in isolation. It appears that one of the main obstacles is the Charity Commission's interpretation of the law with regard to showing public benefit and fitting within the existing descriptions of charitable purposes; in fact, according to the ad hoc advisory group report submitted to the Leveson Inquiry<sup>96</sup> "the law as it stands could admit certain forms of public benefit journalism in pursuit of recognised charitable objects". But further clarity and guidelines have not yet been issued by the Commission following the House of Lords report recommendations, which were reiterated by the ad hoc advisory group. The Charity Commission has a number of difficulties in measuring and recognizing journalism as a charitable activity, but these are difficulties that could be also encountered when recognizing and regulating other types of charitable activity (e.g. the politically-related work of think-tanks), for which the Commission has tools at its disposal.

## 5. Are there charitable/tax exempt news organizations in the country?

### *News/journalism supporting charities*

The most common news-related charities are for supporting journalism education and training; for example, the Guardian Foundation, the Media Standards Trust, the Media Trust,<sup>97</sup> the Centre for Investigative Journalism, BBC Media Action, and MediaWise (formerly PressWise). These examples fall outside a definition of news organization; rather such charitable organizations support the work of news organizations. Their work may involve producing publications but these would not be described as news publications and are part of their wider research and campaigning activity. Another example of a media-supporting charity is the newly established Independent Press Regulation Trust, which has been established to fund independent press regulation, and has just

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<sup>95</sup> Charity Commission, 2014. *Charities, Elections and Referendums*. [online] Gov.uk. Available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/346058/elect.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/346058/elect.pdf)> [Accessed 15 Sep. 2015].

<sup>96</sup> J. Heawood, R. McCarthy, L. Simanowitz, and I. Overton, *Good News? A report by the Advisory Group on Journalism & Charitable Status - representation to the Leveson Inquiry*. 2012. [online] Available at: <<http://www.mediaplurality.com/wp-content/uploads/2013/10/Leveson-submission-Good-News.pdf>> [Accessed 15 Sep. 2015].

<sup>97</sup> In addition, the Media Trust is involved in content provision by running the Community Channel on TV with the support of several broadcasters. <http://www.communitychannel.org/>

been allowed charitable status following a successful appeal to the First Tier Tribunal (Charity) of the Charity Commission's original refusal of charitable registration.

#### *Media producing charities*

Several charities produce media content as part of their wider work (e.g. human rights charities). As Fowler identified in 2011,<sup>98</sup> there are a large number of charities that fund media publications as part of their wider work (e.g. universities, churches, schools, and think-tanks). Much of this activity would be better classified as media-producing than specifically news-producing or journalistic in a sustained and regular way, as would be expected of a mainstream media organization, such as a newspaper or broadcaster.

#### *News/journalism producing charities*

There are far fewer charities, or charitably funded organizations, for which producing news and journalism is a principal activity. However, there are examples where arguably journalistic content is funded by charitable means. It is important to note that these organizations do not necessarily promote themselves as doing journalism or as being a news organization. For example, the website openDemocracy.net, published by openDemocracy Limited, a UK registered company wholly owned by the non-profit company openDemocracy Foundation for the Advancement of Global Education and supported by openTrust, an educational charity, describes itself as a "digital commons ... covering world affairs, ideas and culture," not as a news organization.<sup>99</sup> Although some of its commentary would sit comfortably within the pages of a quality newspaper, the organization does not consider its main activity as producing news. Variations of news/journalism producing charities are set out below.

#### *Charitable journalism in practice*

As suggested above, examples of charitable journalism are generally adaptations of these three models:

1. Charitable ownership and control, in which **charity directly produces journalism** as a core activity;
2. Charitable ownership and control, in which **charity owns or controls a non-charitable journalism-producing organization**
3. Charitably supported journalism in which **non-charitable journalism-producing organizations and individuals receive some support from charities and charitable individuals**

The following examples (listed alphabetically) are variants of these models, some are best seen as a hybrid of the two, with varying levels of involvement by a charitable funder. The examples chosen carry out activities which are closely

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<sup>98</sup> Neil Fowler, 2011, op cit.

<sup>99</sup> In June 2005, openDemocracy formed in New York as a non-for-profit under section 501(c)(3) of the IRC; *openDemocracy USA*. [online]. Available at: <<http://www.opendemocracyusa.org/status.html>> [Accessed 18 Oct. 2015].

related to news and journalism, even if this is not the overall mission of the organization. The final column suggests which model they most closely fit.

<b>Organization</b>	<b>Structure</b>	<b>Suggested model type</b>
<b>Burngreave Messenger</b>	Independent community newspaper which is a registered charity (no. 1130836) and registered as a company - private, limited by guarantee, no share capital (no. 04642734)	1
<b>China Dialogue / China Dialogue Trust</b>	International content published as part of charity's activities (no. 1125378). Registered as a company - Private, Limited by guarantee, no share capital, use of 'Limited' exemption (no. 06477262)	1
<b>Fitzrovia News / Fitzrovia Neighbourhood Association</b>	Local newspaper and website published as part of activities of charitable neighborhood association (no. 1111649). Registered as a company - Private, limited by guarantee, no share capital (no. 01673259)	1
<b>Full Fact</b>	Non-partisan fact-checking website published as part of charity's activities (charity no. 1158683). registered as a company - Private, Limited by guarantee, no share capital, use of 'Limited' exemption (no. 06975984)	1
<b>Index on Censorship / Writers &amp; Scholars Educational Trust</b>	Website and magazine published as part of charity's activities (no. 325003). Some of Index's media activities are managed and funded through an international company - Private, limited by guarantee, no share capital (no. 01157814).	1+2
<b>Jerusalem Productions</b>	Media co-production private limited company (no. 2461543) funded by the registered charity, the Jerusalem Trust (no. 285696)	2 or 3
<b>Lewisham Pensioners Gazette</b>	Quarterly newspaper for pensioners published by local charity (no. 1139984). Principal activity is the production and distribution of the newspaper. Registered as a company - Private, limited by guarantee, no share capital (no. 07337777).	1
<b>Maidenhead Advertiser</b>	Newspaper run by the private limited company Baylis Media Ltd (00382741), which is owned by The Louis Baylis (Maidenhead Advertiser) Charitable Trust (no. 210533) The charitable trust receives at least 80% of newspaper's profits.	2
<b>openDemocracy</b>	Website published by the private limited company openDemocracy Ltd (no. 03855274), wholly owned by the openDemocracy Foundation for the Advancement of Global Education company (Private, limited by guarantee, no share capital - no. 04807614) and partially supported by a charity, The OpenTrust (no 1086404).	3
<b>The Ambler / Amble Development Trust</b>	Community newspaper and hyperlocal site produced by charitable trust (no. 1051657). Produced by	1

	volunteers with the Trust's media development worker. Registered as a company - Private, Limited by guarantee, no share capital, use of 'Limited' exemption (no. 02990425)	
<b>The Conversation UK*</b>	The Conversation UK is owned by The Conversation Trust (UK) Limited and is a not for profit educational entity. The Conversation Trust (UK) is a registered charity (1151436) and a registered company - Private, limited by guarantee, no share capital (no. 08158264). It receives support from UK universities and funding from a number of other organizations including charities.	1
<b>Which? Magazine</b>	Published by the Consumers' Association (charity no. 296072) through its trading company Which? Ltd, which is registered as a private limited company (no. 00677665)	2
<b>Wikimedia UK</b>	Wikimedia UK is a charity (no. 1144513) that supports and promotes Wikipedia and the other Wikimedia projects such as Wikimedia Commons. Wikimedia UK is registered as a company - Private, Limited by guarantee, no share capital, use of 'Limited' exemption (no. 06741827). Wikimedia UK is legally independent of the Wikimedia Foundation, the US-based non-profit organization that operates Wikipedia.	Hybrid

\* This is the UK edition of The Conversation, which originated in Australia

## 6. Are there news organizations that are not charities or tax exempt that are able to receive gifts/grants through some other structures or means?

This is the situation that applies in Scenario 3 (Charitably supported journalism in which non-charitable journalism-producing organizations and individuals receive some support from charities and charitable individuals) and the tax situation for the recipient would depend on the recipient's circumstances.

Non-charities (which could include journalism producing organizations) are not prohibited from receiving charitable funding. However, funders would require sufficient evidence that the activities are charitable and further charitable purposes. The Charity Commission has recently issued a regulatory alert "reminding charities to ensure that funds are used only for charitable activities which further the purposes of their charity and do not expose it to reputational risks or other risks that impact on public trust and confidence in charity".<sup>100</sup>

The tax situation for the recipient of a grant would be situation-dependent; a grant would not necessarily be exempt from corporation tax for the non-charitable recipient, who would need to seek specialist tax advice for their circumstances.

<sup>100</sup> Gov.uk, *Funding of non-charitable organisations*. 2015.[online] Gov.uk. Available at: <<https://www.gov.uk/government/news/funding-of-non-charitable-organisations>> [Accessed 17 Oct. 2015].



If the activity constitutes a service being provided to a charity, this should be contracted as a service for which VAT may be payable, and not administered as grant-funded activity.

*Alternative non-charitable funding sources for news organizations*

Crowd-funding of individual journalists and non-charitable organizations

- Non-charitable funding or sponsorship of journalistic content

*Alternative non-charitable structures/models for news organizations*

Non-charitable trust ownership and control

- Community Interest Companies and co-operatives
- Non-charitable Company Limited by Guarantee (CLG)

*Explicit subsidies for funding media*

- Public service broadcaster funding through the license fee
- Local TV (there are unallocated funds available following last year's license fee settlement, see Radcliffe, 2015)<sup>101</sup>
- Community Radio funding<sup>102</sup>

*Implicit subsidies for funding news*

- VAT exemption for newspaper and magazine sales
- Revenue from local councils for statutory notices placed in local newspapers

## **7. Have recent efforts been made to permit newspapers, digital media, and other media to become charities? By whom? With what outcomes?**

Recent examples of publications which have secured charitable status include:

**China Dialogue Trust** (registered as a charity in 2008) publishes a bi-lingual Chinese and English website, dealing with issues concerning the conservation, protection and improvement of the physical and natural environment in the People's Republic of China. It aims to "advance the education of the public (including in particular the public of the People's Republic of China) in the conservation, protection and improvement of the physical and natural environment"; and "to promote for the benefit of the public the conservation protection and improvement of the physical and natural environment and in particular but not so as to restrict the preceding working, the physical and natural environment in the People's Republic of China".<sup>103</sup>

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<sup>101</sup> Damian Radcliffe, *How can policy makers support UK hyperlocal media?* [online] Carnegie UK Trust. 2015. Available at: <<http://www.carnegieuktrust.org.uk/blog/june-2015/how-can-policy-makers-support-uk-hyperlocal-media->> [Accessed 15 Sep. 2015].

<sup>102</sup> More than 200 small, low-power local radio broadcasters operate in the UK as not-for-profit entities. Their funding comes from a variety of sources including donor support, grants, sponsorships, and advertising. The UK government, like Australia, provides funding for community radio, offering £500,000 that stations can bid for even without being registered charities.

<sup>103</sup> Charity Commission, *1125378 - CHINA DIALOGUE TRUST*. 2015. [online] Charitycommission.gov.uk. Available at: <<http://apps.charitycommission.gov.uk/Showcharity/RegisterOfCharities/CharityFramework.aspx?RegisteredCharityNumber=1125378&SubsidiaryNumber=0>> [Accessed 15 Sep. 2015].

**The Conversation Trust (UK)** (registered as a charity in 2013) is publisher of an online news analysis and commentary website (The Conversation) where all articles are written by academics for a general non-academic audience.<sup>104</sup> Authors and editors sign up to an Editorial Charter and contributors must abide by its Community Standards policy. All its articles are available for republishing free of charge under a Creative Commons license. Its charitable object is the advancement of education.

**Full Fact** (registered as a charity in 2014) is an independent fact-checking organization that provides tools, advice and information to allow people to assess claims heard about public issues. It was originally rejected twice by the Charity Commission before successfully securing charitable status after a third application.<sup>105</sup> It aims to advance public education “in the fields of crime, health, immigration, economy, education, environment and social welfare, through education, research and training” ... to “promote and advance public understanding and inform public debate” ... “by making available to the public, through a process of objective, impartial research and rigorous factual analysis, full, accurate and relevant information”.<sup>106</sup>

**Wikimedia UK** (registered as a charity in 2011) exists to “help collect, develop and distribute freely licensed knowledge”, and “other educational, cultural and historic material”. The objects of the charity are, “for the benefit of the public, to promote and support the widest possible public access to, use of and contribution to open content of an encyclopedic or educational nature or of similar utility to the general public”. In particular, this is the “open content supported and provided” by Wikimedia Foundation, Inc. based in California.<sup>107</sup>

**The Bureau of Investigative Journalism** has unsuccessfully tried to attain charitable status on two occasions. The following account is based on notes from a seminar held in June 2014.<sup>108</sup> The first application was on the basis that its

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<sup>104</sup> Charity Commission, 1151436 - THE CONVERSATION TRUST (UK) LIMITED. 2015. [online] Available at: <<http://apps.charitycommission.gov.uk/Showcharity/RegisterOfCharities/CharityWithPartB.aspx?RegisteredCharityNumber=1151436&SubsidiaryNumber=0>> [Accessed 16 Dec. 2015].

<sup>105</sup> Charity Commission, 1158683 - FULL FACT. 2015. [online] Charitycommission.gov.uk. Available at: <<http://apps.charitycommission.gov.uk/Showcharity/RegisterOfCharities/CharityFramework.aspx?RegisteredCharityNumber=1158683&SubsidiaryNumber=0>> [Accessed 15 Sep. 2015].

<sup>106</sup> A. Sharman, *Full Fact gets charity status after being rejected twice*. 2014 [online] Civilsociety.co.uk. Available at: <[http://www.civilsociety.co.uk/governance/news/content/18563/full\\_fact\\_gets\\_charity\\_status\\_after\\_being\\_rejected\\_twice](http://www.civilsociety.co.uk/governance/news/content/18563/full_fact_gets_charity_status_after_being_rejected_twice)> [Accessed 15 Sep. 2015].

<sup>107</sup> Charity Commission, 325003 - WRITERS AND SCHOLARS EDUCATIONAL TRUST. 2015. [online] Charitycommission.gov.uk. Available at: <<http://apps.charitycommission.gov.uk/Showcharity/RegisterOfCharities/CharityWithPartB.aspx?RegisteredCharityNumber=325003&SubsidiaryNumber=0>> [Accessed 15 Sep. 2015].

<sup>108</sup> University of Westminster, *Discussion seminar: charitable initiatives for journalism and media - summary*. 2014 [online] Available at: <[http://www.mediaplurality.com/wp-content/uploads/2014/04/Charity-seminar-summary-June-2014\\_updated.pdf](http://www.mediaplurality.com/wp-content/uploads/2014/04/Charity-seminar-summary-June-2014_updated.pdf)> [Accessed 15 Sep. 2015].

objects were the advancement of citizenship. Although the name of the Bureau may have been a problem, by including the word “journalism”, which is not a charitable object, it could not solve the problem just by changing the name. The substantive issue is that it cannot prove that its activities would produce the promised result, and therefore fulfil its charitable purpose. The Charity Commission said the application had “not presented any evidence to show that the company’s input to investigative journalism translates into participation/engagement either in terms of decision making or participation in democratic processes”. It was clear that it was not enough to show that journalism has an effect, it was necessary to show that “the outcome results from engagement or participation or better informed decision making of citizens arising from the company’s [i.e., the Bureau’s] activities”. Having impact was not enough – impact was not deemed evidence of citizenship participation. It is worth noting, however, that the Bureau had not yet sought to put forward evidence of its impact in furthering citizenship.

The Bureau’s second application was based on educational objects but this also failed because the Commission felt that its subject matter was not sufficiently precise. The Bureau has considered a third application, based on the “advancement of the education of the public in the governance of public, private and charitable organisations”. The application was put on hold until it could be more confident of success. The Bureau felt it needed clearer guidance from the Commission on the evidence they need to prove the connection between journalism and active citizenship.

**The Independent Press Regulation Trust** was allowed to register as a charity in 2015.<sup>109</sup> It will not produce journalism itself, but will support independent press regulation. It does not fit within the three journalism-producing models given above but is worth mentioning because the Objects of the Charity are closely linked to promoting journalism: “to promote, for the benefit of the public, high standards of ethical conduct and best practice in journalism and the editing and publication of news in the print and other media, having regard to the need to act within the law and to protect both the privacy of individuals and freedom of expression” - see paragraph 4, *Wilfrid Vernor-Miles and Others and the Charity Commission for England and Wales* [2015] (First-Tier Tribunal (Charity)).<sup>110</sup>

## 8. What do tax authorities, parliamentarians/legislators, and media personnel think about charitable status for news organizations?

In his evidence to the House of Lords committee, the then Secretary of State for Culture, Media, Olympics and Sport, Jeremy Hunt said: “There have been no

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<sup>109</sup> Charity Commission, 1162737 - *THE INDEPENDENT PRESS REGULATION TRUST*. 2015. [online] Charitycommission.gov.uk. Available at: <<http://apps.charitycommission.gov.uk/Showcharity/RegisterOfCharities/CharityFramework.aspx?RegisteredCharityNumber=1162737&SubsidiaryNumber=0>> [Accessed 15 Sep. 2015].

<sup>110</sup> *Wilfrid Vernor-Miles and Others and the Charity Commission for England and Wales* (First-Tier Tribunal (Charity)) 2015. Available at: <<http://www.charity.tribunals.gov.uk/documents/decisions/Vernor-Miles-decision-15-Jun-15.pdf>> [Accessed 15 Sep. 2015].

calls from the public or the charity sector to recognize investigative journalism as a charitable purpose so ... Government is not currently inclined to legislate". Nonetheless, in January 2012 in its report on the future of investigative journalism the House of Lords Committee select committee recommended to the Government that: "reform of charity law is the only way in which certainty in this area [of charitably funding journalism] could be achieved."

Following publication of the report, Baroness Garden of Frognal, the Lords Spokesperson for the Department for Culture, Media and Sport until September 2012, told a House of Lords debate that:

*The existing list of charitable purposes has .... recently been reviewed by my noble friend Lord Hodgson of Astley Abbotts. The Government are [sic] now considering his recommendation that no change should be made to the current list.*<sup>111</sup>

At that time, it was indicated that the government would respond more fully after the Leveson Inquiry reported. However, the Government did not formally respond to the Committee. Since then, the committee membership has completely changed, with a new clerk, chairperson and (mostly) new members. There has been no indication of further reform of this area with no announcement of further public consultation.

The Committee also asked the Charity Commission "to provide greater clarity and guidelines on which activities related to the media, and in particular investigative journalism, are charitable in the current state of the law. Furthermore, we ask the Charity Commission to take into consideration both the current pressures on investigative journalism as well as its democratic importance when interpreting the relevant legislation." The ad hoc advisory group that submitted written evidence to Lord Justice Leveson said that the Commission had not responded to this request. The Charity Commission did not formally respond to the House of Lords communications committee.

Traditional media organizations (newspapers and broadcasters) have not paid a great deal of attention to this discussion and have generally raised concerns about the commercial rather than non-profit sector in parliamentary committee inquiries. As mentioned, there have been concerns raised about state interference by way of public subsidy, but these do not necessarily acknowledge existing implicit subsidies as such (including statutory public notice advertising revenue for newspapers and VAT exemption for newspaper and magazine copy sales and subscription sales). However, it is an issue that has been reported in the National Union of Journalists magazine<sup>112</sup> and industry titles covering the charitable sector.

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<sup>111</sup> Parliament.uk, *Daily Hansard 25 July 2012: Column GC305*. [online] Parliament.uk. Available at: <<http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120725-gc0001.htm#12072541000330>> [Accessed 15 Sep. 2015].

<sup>112</sup> S. Burne-James, *The Journalist - March / April 2015*. [online] Issuu. Available at: <[http://issuu.com/nujupload/docs/journalist\\_march\\_april\\_2015](http://issuu.com/nujupload/docs/journalist_march_april_2015)> [Accessed 15 Sep. 2015].

The research project at University of Westminster indicated support from the academic, charity law and non-profit sector support for more flexibility in the regime, but there has been no coordinated action. Some overt political support can be found: the Liberal Democrat election manifesto in 2015 suggested “allowing non-profit local media outlets to obtain charitable status where the public interest is being served”.<sup>113</sup> However, there is no evidence of further discussion since the new Conservative government began its term.

### **9. How does the presence or lack of charitable status affecting development of not-for-profit news organizations?**

A lack of charitable status inhibits the development of not-for-profit journalism and news organizations in a number of ways. It is difficult to secure charitable funding and gifts from philanthropists without charitable status: the Advisory Group report to Leveson in 2012 described how non-charitable business structures do not require organizations to “undergo the rigorous test applied by the Charity Commission” and are “not capable of attracting the same kind of philanthropic or public support through donations.”<sup>114</sup> There are limited opportunities here for organizations that wish to develop a viable form of non-profit journalism”. Other benefits are that it would allow provision of publicly beneficial activity that is not always viable within commercial journalism models (e.g. does not attract consumer or advertising money). There is an obvious financial benefit: journalism producers would be able to claim gift aid and be eligible for other tax exemptions. Charitable news organizations would also be able to attract bequests and legacies. Finally, charitable status would bring reputational value for journalism by ensuring best practice: a charity’s objects could be designed in such a way to safeguard the quality and standards of its work.

#### *Summary points*

What can be seen as best practices in the English regime?

- There is flexibility within existing regime for charitably funding non-charitable entities, without the burden of becoming a charity
- The framework around charity law is progressive: what can be a charity is subject to change, as the economic and social context shifts. It can adapt to the contemporary values of society
- The rigorous tests applied by the Charity Commission, once the public benefit and charitable purpose of a new organization’s activity is established, should help ensure high standards of its journalism

What are the major legal/regulatory challenges to obtaining charity status?

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<sup>113</sup> Professor Steven Barnett, who directed the University of Westminster project, was a policy adviser on media issues to the Liberal Democrats and helped to draft this part of their election manifesto.

<sup>114</sup> Heawood, McCarthy, Simanowitz, and Overton, 2012, op cit.

- The evidence shows there has been a lack of overt recognition of journalistic activity and output within existing descriptions of charitable purposes.
- There are difficulties in demonstrating public benefit of journalistic activity and output to meet demands at registration stage.
- There is conservatism and suspicion about the political nature of journalism and a lack of recognition that a journalistic organization could fit within the requirements for political campaigning and activity.

## 10. Conclusion

The material reviewed indicates that certain journalistic activities which are non-political and not for private benefit could be recognized under the existing framework. Indeed, a few organizations with mainly educational or community development purposes have, in certain circumstances, been able to enjoy charitable status, because their journalistic activities can be shown to deliver public benefit in line with their charitable purposes and because any political campaigning has been shown to be incidental to their objects.

The evidence presented here suggests that in particular circumstances, a certain form of journalism (balanced, informational, non-political), produced by a certain kind of organization (with a focus on education or community development), may be able to attract charitable status and/or charitable donations. This could offer an important opportunity to small local not-for-profit news organizations, and other types of non-commercial news organizations.

## Summary of the contemporary situation

The UK not-for-profit media scene is growing, and there is evidence of support to alter charity law to make it easier for news enterprises to achieve charity status. Despite those developments, there is little movement toward altering the law and most journalism organizations desiring the status are structuring themselves in organizations designed to pursue purposes currently recognized for charitable status and then engaging in media activities to fulfil these purposes.

## The United States: The impact of charity and tax law/regulation on not-for-profit news organizations

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Since 2008 the number of not-for-profit media organizations has grown exponentially. According to Pew Research, 172 not-for-profit digital media outlets emerged between 1987 and 2012, 46% of which were created in 2008 and 2009. This explains why there has been a significant increase in the number of media outlets applying for tax-exempt status under section 501(c)(3) of the Internal Revenue Code (hereinafter “IRC”). This legal status exempts not-for-profit media outlets from the payment of corporate tax and allows them to receive tax-deductible donations from foundations and individuals. However, in the past years, not-for-profit media organizations have encountered multiple obstacles and delays in the process of obtaining this tax-exempt status.

The Internal Revenue Service (IRS) has significant discretion in applying section 501(c)(3) IRC since no specific tax exemptions are established in the law for journalism. Not-for-profit media organizations must demonstrate that they satisfy the organizational and operational tests, arguing that their activities serve an educational purpose.

The IRS has been criticized for applying outdated frameworks to not-for-profit media, disregarding the characteristics of the sector, applying incoherent criteria, and delaying exemption decisions. In addition, despite the financial difficulties experienced by not-for-profit media organizations to diversify their revenue sources, advertising in not-for-profit media outlets is frowned upon by the IRS and might easily put at stake their tax-exempt status.

Once the tax-exempt status is granted to a not-for-profit media outlet, the latter is allowed to receive tax deductible contributions. The qualification of the legal entity as a public charity or private foundation determines the limit of the tax deduction.

Since 2009 legislative efforts have been made to revise the IRS outdated framework regarding the assessment of tax-exempt applications filed by not-for-profit media outlets. This was the case of the 2009 Newspaper Revitalization Act, allowing newspapers to restructure as not-for-profit similar to public broadcasting stations, which was unsuccessful. The Federal Communication Commission (FCC) has also emphasized the importance of reviewing the mentioned tax framework in order to support not-for-profit journalism.

A number of media hybrid entities have emerged in the last years in order to bridge the gap between not-for-profit social goals and the for-profit revenue model. These legal entities often operate as for-profits and are associated with non-for-profit media outlets that are allowed to receive charitable contributions.



The expansion of not-for-profit media has had an impact on the access to news by local communities and the development of investigative journalism. However, there are concerns that funders might try to influence the content of the news published by not-for-profit media news.

## 1. Introduction

Since 2008 the number of media outlets seeking tax-exempt status has increased significantly. In 2013, Pew Research analyzed 172 not-for-profit digital outlets, concluding that 46% of these news outlets was created in 2008 and 2009 (Pew Research, 2013). Socio-economic conditions have hastened the decline of the American newspaper trade, creating an industry-wide financial crisis.<sup>115</sup> In addition, the increasing use of the Internet for the consumption of news, free online readership, the preference for the classified advertisement website Craigslist in detriment of the once profitable classified section of newspapers have had a substantial impact on the business model of newspapers (Freddoso, 2009). Meanwhile, almost all American newspapers saw their profitability and reporting sources decrease dramatically.<sup>116</sup> In this context, between 2008 and 2009, 67 newspapers vaporized in the United States.<sup>117</sup> The number of daily newspapers has decreased in the past two decades: While in 1990 there were more than 1, 500 daily newspapers, in 2009 1, 387 newspapers were left.<sup>118</sup> This crisis was particularly visible in 2009, when 10,000 newspapers jobs disappeared in the US<sup>119</sup> According to the Pew Research Center, in 2012, there were 38, 000 full-time newsroom jobs, whereas in 2007, the number of full-time employees in this sector was 52,600.<sup>120</sup>

Since 2008, the circulation of newspapers has suffered drastic reductions and multiple major newspapers filed for bankruptcy or were on the verge of doing so at a certain point in the last years (e.g. the *Minneapolis Star-Tribune*, the *Los Angeles Times*, the *Chicago Tribune*, the *Philadelphia Inquirer*).<sup>121</sup>

As a growing number of newspapers are closing down or reducing staff, journalists try to turn to the not-for-profit sector in order to find new forms of

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<sup>115</sup> Andrea Priest. Turning the Watchdog into a Lapdog: Why the Proposed Newspaper Bailout is the Wrong Solution for a Failing Industry, *William & Mary Business Law Review*, vol.2, 2011, p. 401.

<sup>116</sup> Nicholas Lemann, The Reconstruction of American Journalism: About this Report', *Columbia Journalism Review*, October 19, 2009, available at [http://www.cjr.org/reconstruction/the\\_reconstruction\\_of\\_american\\_1.php](http://www.cjr.org/reconstruction/the_reconstruction_of_american_1.php).

<sup>117</sup> Chen, Stephanie. (2009). Newspapers Fold as Readers Defect and Economy Sours. *CNN* March 19, 2009, available at [http://www.cnn.com/2009/US/03/19/newspaper.decline.layoff/index.html?eref=ib\\_us](http://www.cnn.com/2009/US/03/19/newspaper.decline.layoff/index.html?eref=ib_us).

<sup>118</sup> Statista. Growth of Daily Newspapers Circulation Worldwide in Selected Countries between 2008 and 2012, 2012, available at <http://www.statista.com/statistics/259729/growth-of-newspaper-circulation-worldwide/>

<sup>119</sup> Preehi Dumpala. The Year Newspaper Died, *Business Insider*, July 4, 2009, available at <http://www.businessinsider.com/the-death-of-the-american-newspaper-2009-7>

<sup>120</sup> Mark Jurkowitz. The Losses in Legacy. *Pew Research Center*, 2014, available at <http://www.journalism.org/2014/03/26/the-losses-in-legacy>.

<sup>121</sup> David Freddoso. Church of Journalism, *National Review*, May 8, 2009, available at <http://www.nationalreview.com/article/227457/church-journalism-david-freddoso>.



subsidizing investigative reporting and continue the publication of newspapers both on their online and paper versions.<sup>122</sup> Nowadays the not-for-profit media sector includes numerous not-for-profit websites, public, educational and governmental access (PEG) cable television channels, lower power FM stations, state public affairs networks, journalism schools, public radio networks unaffiliated with NPR, foundations, mobile news apps, and others.<sup>123</sup> Well-known examples of not-for-profit media outlets are Mother Jones, National Public Radio (NPR), the American Spectator, and the Center for Public Integrity.

The size, financial maturity, and staffing capacity of not-for-profit media vary dramatically across media outlets.<sup>124</sup> For example, the *Texas Tribune* is an all-digital media outlet which has more than 40 staff members and . It was created in 2009 by venture capitalist John Thornton and a number of journalists. With a 2013 budget of more than \$7 million, and through new grant money from private contributions, the Texas Tribune began staffing a Washington bureau in 2014.<sup>125</sup> The majority of not-for-profit media outlets are however small and understaffed not-for-profit outlets with fewer than five employees.<sup>126</sup> The San Francisco Public Press (2009), the Austin Investigative Reporting Project (2009), the Common Language Project (2007) (running the Seattle Globalist since 2013), and Out of Eden (2013) are examples of smaller media outlets that were recently granted tax-exempt status.

#### *Defining 'not-for-profit media'*

A not-for-profit organization is 'one that is precluded by external regulation or its governance structure, from distributing its financial surplus to those who control the use of organizational assets'.<sup>127</sup> In this report a broad concept of 'news organization' and 'not-for-profit media organization' is adopted in order to include digital media outlets, newspapers, broadcasters, radio, and centers for investigative journalism. From a federal tax law perspective, the concept of not-for-profit media will be however narrower, focusing on 'tax-exempt charitable organizations', *i.e.*, not-for-profit media outlets that seek tax-exempt status under section 501(c)(3) of the Internal Revenue Code ('IRC'). The Council of Foundations defines not-for-profit media as "organizations that seek 501(c)(3) tax-exempt status as public charities .... and serve a valuable role in educating citizens through in-depth public interest reporting, including investigative

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<sup>122</sup> Marion Smith and R. Fremont. Can Nonprofits Save Journalism? Legal Constraints and Opportunities, Joan Shorenstein Center, 2009, available at [http://shorensteincenter.org/wp-content/uploads/2012/03/can\\_nonprofits\\_save\\_journalism\\_fremont-smith.pdf](http://shorensteincenter.org/wp-content/uploads/2012/03/can_nonprofits_save_journalism_fremont-smith.pdf).

<sup>123</sup> Federal Communications Commission. The Information Needs of Communities: The Changing Media Landscape in a Broadband Age, Report, 2011, available at <https://transition.fcc.gov/osp/inc-report/INoC-31-Nonprofit-Media.pdf>.

<sup>124</sup> Pew Research Center (2013). NonProfit Journalism: A Growing but Fragile Part of the US News System, June 10, 2013, available at <http://www.journalism.org/2013/06/10/nonprofit-journalism/>.

<sup>125</sup> Knight Foundation, *Finding a Foothold: How Nonprofit News Ventures seek Sustainability*. Miami, Knight Foundation, 2014.

<sup>126</sup> Knight Foundation, 2014, op cit.

<sup>127</sup> Henry Hansmann, Economic Theories of NonProfit Organization, in *The NonProfit Sector* 27 (W. Maxwell ed., 1987).

journalism, news reports, explanatory journalism, solutions journalism, and specialty journalism, in order to elevate important social topics, particularly at the local level”.<sup>128</sup> Obtaining tax-exemption is the main goal and benefit of being granted a charitable status.

In the US, the not-for-profit sector has received a number of designations in the last decades so as to reflect its different dimensions and activities (e.g., philanthropic sector, private sector, voluntary sector, and third sector).<sup>129</sup> For-profit and not-for-profit entities can both generate profits but the latter is limited in how much profit it can generate. Not-for-profit organizations that seek a tax-exempt status are not allowed to use any part of its net earnings for the benefit of any private shareholder or individual (private inurement doctrine, IRC §501(c)(3)). Tax-exempt organizations are subsets of not-for-profit organizations. Although the not-for-profit sector is often associated with charitable activities, a charitable organization is only a category of not-for-profit organizations. Charitable organizations are subsets of tax-exempt organizations which are eligible to receive tax-deductible gifts.

*Guidestar* provides an overview of the existing charitable organizations engaged in journalistic activities, their assets and size.<sup>130</sup> From the analysis of the data available on its database, one can conclude that there are different types of charitable organizations engaged in journalism. It is important to note that federal tax law recognizes 68 categories of tax-exempt organizations, such as business leagues, fraternal societies, social welfare organizations, and employee organizations.<sup>131</sup> Most of these categories are not relevant for our definition of not-for-profit media.

Based on the types of not-for-profit media outlets identified on *Guidestar*, this report refers primarily to three categories of tax-exempt organizations under section 501(c)(3) of the IRC:

- a) Public charities (e.g., Pulitzer Center on Crisis Reporting);
- b) Private non-operating foundation (e.g., John S. Knight Memorial Journalism Fund Inc.);
- c) Private operating foundation (e.g., Alfred Friendly Foundation);

In effect, the definition divides section 501(c)(3) organizations into two broad categories: private foundations and *public charities*. The term public charities refers to organizations that:

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<sup>128</sup> Council of Foundations (2015). *Nonprofit Media*, Council on Foundations, 2012, available at <http://www.cof.org/nonprofitmedia>.

<sup>129</sup> Jamie Hopkins. Low-Profit Limited Liability Companies: High-Risk Tax Fad or Legitimate Social Investment Planning Opportunity? *Cardozo Law Review De Novo*, 2014, p. 5.

<sup>130</sup> A simple search on *Guidestar.org* using journalism as keyword and excluding any not-for-profit that does not have a tax-exempt status, delivered 650 results (June 19, 2015). These results included public charities, private non-operating foundations, and private operating foundations.

<sup>131</sup> Jamie Hopkins, 2009, op cit., p. 29.

- a) Are churches, hospitals, qualified medical research organizations affiliated with hospitals, schools, colleges and universities;
- b) Have an active program of fundraising and receive contributions from many sources, including the general public, governmental agencies, corporations, private foundations or other public charities;
- c) Receive income from the conduct of activities in furtherance of the organization's exempt purposes; and
- d) Actively function in a supporting relationship to one or more existing public charities.

Under section 501(c)(3) of the IRC disposition, a private foundation is:

*any domestic or foreign organization described in section 501(c)(3) of the Internal Revenue Code except for an organization referred to in section 509(a)(1), (2), (3), or (4).*

Private foundations are charitable organizations that do not qualify as public charities. In practice, private foundations usually are not-for-profits that were established with funds from a single source or specific sources, such as family or corporate money.<sup>132</sup>

Private foundations can be 'private operational foundations' or 'nonoperational foundations'.

Although contributions to private foundations technically are tax deductible, a number of these not-for-profits organizations do not accept donations.<sup>133</sup> Instead, private foundations often have endowments and invest their principal funding, then distribute the income from investments for charitable purposes. The key difference between a private non-operating foundation and a private operating foundation is how each distributes its income. While a private non-operating foundation grants money to other charitable organizations ('grantmaker'), a private operating foundation distributes funds to its own programs that exist for charitable purposes. A significant number of not-for-profit media organizations listed on Guidestar are qualified as public charities. 602 out of the 650 organizations listed as not-for-profit organization with a tax-exempt status under section 501(c)(3) IRC are public charities.

## **2. What charity and tax laws and regulations govern the granting of charitable status?**

In the US, the granting of charitable status is regulated on different levels, resulting from a combination of federal and state laws. Sections 501(c)(3) and 170(b)(1) of the Internal Revenue Code and their respective regulations

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<sup>132</sup> Guidestar, Just What Are Public Charities and Private Foundations, Anyway? *Guidestar*, 2011, <https://www.guidestar.org/rxa/news/articles/2001-older/just-what-are-public-charities-and-private-foundations-anyway.aspx>.

<sup>133</sup> Guidestar (2011), op cit.

primarily determine the tax regulation of charitable status and charitable contributions (see Table I).<sup>134</sup>

At the federal level, the regulation of charitable status and contributions refers to income tax, estate tax, and gift tax. At the local level, states, counties, and cities can have one or more types of charitable contributions and rules on tax-exempt status. The first step for a media outlet to obtain tax-exempt status is to become established in one state and form a not-for-profit corporation under state law. After forming the not-for-profit corporation, the media outlet must try to obtain federal and state tax exemptions. The first step is to apply for federal tax-exempt status at the Internal Revenue Service (IRS). Not-for-profit organizations must then apply to the state tax authorities for an exemption from a number of state taxes (e.g., state sales). While most states streamline their tax exemption application with the IRS one, some states like California have a separate tax exemption procedure.<sup>135</sup> While the tax and corporation rules vary across states, some states (e.g., Delaware, Wisconsin, Arizona, and Nevada) have fewer regulations on not-for-profits than California, for example. 39 states have fundraising registration requirements, which should be taken into consideration by not-for-profit organizations. It is worth noting that some states do not have corporate tax exemption for not-for-profits because they do not charge corporate taxes at all (with the exception of state sales and other taxes). A number of states also exempt not-for-profits upon reception of a federal tax-exempt status (either automatically or upon notification).<sup>136</sup>

The epicenter of the law of tax-exempt organizations is section 501(c)(3) of the Internal Revenue Code, which contains most requirements that must be satisfied to obtain tax-exempt status.<sup>137</sup> However, the creation of not-for-profit organizations is primarily regulated by state law, which should always be taken into account. In this report, more emphasis is placed on federal rules and on the role of section 501(c)(3) IRC in the tax regulation of not-for-profit media organizations.

#### *§ section 501(c)(3) IRC*

The primary regulation of tax-exempt charitable is set forth in sections 501(c)(3)-501 (c) (9) of the IRC and the regulations under those sections. According to section 501(c)(3), an “organization must be organized and operated exclusively for exempt purposes .... and none of its earnings may inure.” Most organizations seeking tax-exempt status must file an application for recognition of this status

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<sup>134</sup> Hopkins, 2014, op cit., p. 3.

<sup>135</sup> The interaction between federal and state law is complex and implies the analysis of the laws of the different 50 states. The IRS provides general information and guidance on this matter in Publication 557 (<http://www.irs.gov/pub/irs-pdf/p557.pdf>).

<sup>136</sup> Jeffrey P. Hermes, Guide to the Internal Revenue Service Decision-Making Process under 501 (c) (3) for Journalism and Publishing Non-Profit Organizations. 2012. Berkman Center for Internet & Society, Research Publication No. 2012-8, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2031708](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031708).

<sup>137</sup> Scott A. Taylor. *The Law of Tax-Exempt Organizations in a Nutshell*. St. Paul, MN. Thomson Reuters, 2011, p. 52.

with the IRS and fulfill the so-called organizational and operational tests explained in the IRC:

*To be tax-exempt under section 501(c)(3) of the Internal Revenue Code, an organization must be organized and operated exclusively for exempt purposes set forth in section 501(c)(3), and none of its earnings may inure to any private shareholder or individual....Organizations described in section 501(c)(3) are commonly referred to as charitable organizations.*

#### Operational and organizational tests

The organizational test for charitable organizations consists of two requirements: first, the organization's statement of *purposes* which should coincide with those stated under section 501(c)(3); and a *dissolution clause*, requiring the direct passage of the organization's assets and net income in the event of its dissolution or liquidation for charitable ends.<sup>138</sup>

Purpose:

An organization that seeks tax-exempt status under section 501 (c) (3) must have one or more of the following listed purposes:

- a) Charitable;
- b) Religious;
- c) Educational;
- d) Scientific;
- e) Literary.

Alternatively, the organization can also engage in:

- f) Testing for public safety;
- g) Foster amateur competition;
- h) Work to prevent cruelty to children or to animals.

The legislative order of the purposes was not followed in this report since the first three purposes are not only the most important categories in the current not-for-profit sector,<sup>139</sup> but also the most common purposes invoked by not-for-profit media outlets. Most not-for-profit media organizations try to demonstrate that their journalistic activities serve an educational purpose. The IRS interprets the term 'educational' in a very broad sense as:

- a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
- b) The instruction of the public on subjects useful to the individual and beneficial to the community.<sup>140</sup>

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<sup>138</sup> Bruce R. Hopkins and Jody Blazek, *Private Foundations: Tax Law and Compliance*. Hoboken, N.J. Wiley, 2014, p. 24.

<sup>139</sup> Scott A. Taylor, *The Law of Tax-Exempt Organizations in a Nutshell*. St. Paul, MN. Thomson Reuters, 2011, p. 59.

<sup>140</sup> Taylor, 2011, op cit.

The IRS does not automatically consider journalism as an educational activity. The majority of not-for-profit media outlets try to obtain tax-exempt status by claiming that they have an educational purpose. According to media lawyer Jeffrey Hermes,<sup>141</sup> even when news organizations try to invoke other purposes, such as charitable or literary purposes, the IRS still tends to apply its framework for educational organizations to media outlets. One of the challenges faced by media outlets resides in the definition of educational, which is a multi-layered concept. In order to assert whether an applicant's purpose is educational, the IRS applies methodology test, which was codified in 1986 in Revenue Procedure 86-43. The Internal Revenue Manual (2015) provides the following guidance on 'educational purposes' and 'educational activities' (the most relevant parts for not-for-profit journalism have been underlined):

'Educational purposes under IRC 501(c)(3) are broader than presenting formal classroom instruction. This gives rise to ancillary activities such as the granting of scholarships. This also includes advocating a particular position or viewpoint resulting in some type of public dissemination, which may take the form of published literature, media presentations, or the dramatic arts.

Some organizations that educate the public may do so by disseminating information to the public using commercial methods. Such dissemination by itself does not pose a problem provided that the activity furthers one or more of an organization's exempt purposes and provided that the organization is not operated for the primary purpose of conducting an unrelated trade or business, as defined in IRC 513. As with all exempt organizations, the mere absence of a profit motive does not guarantee an educational organization as opposed to a marketable entity.

Among the activities of an educational organization, you may come across:

- a. Presentations of public discussion groups, forums, panels, lectures or similar programs (on radio, TV or the internet.)
- b. Instructional courses presented by means of correspondence, or via radio, TV or the Internet.

In addition to the statement of a charitable purpose, the governing instruments of private foundations must comply with additional federal income tax and state law organizational requirements. The foundation's articles of organization should, for example, prohibit the foundation from engaging in any act of self-dealing, retaining any excess business holdings, or making any taxable expenditure.

Operating for charitable purposes means that the charity organization operates exclusively to accomplish one or more of the above-mentioned purposes. The

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<sup>141</sup> Hermes, 2012, op cit.

term exclusively means primarily.<sup>142</sup> Therefore, not-for-profit organizations could engage in a small amount of nonexempt activity (e.g., advertising).

*Challenges: Educational Purposes, Supported Viewpoints, and the First Amendment*

The assessment of a not-for-profit's educational purpose is often associated with other subjects, namely the presentation of viewpoints or positions and the inquiry of whether these positions are sufficiently supported. This is relevant because all tax-exempt charities are prohibited from participating in or supporting candidates for public office or engaging political propaganda. Section 501(c)(3) organizations are restricted in how much political and legislative (lobbying) activities they may conduct. Although not-for-profit media outlets can convey a certain ideology, their journalistic activities and articles must be supported, fulfilling an educational message. While the IRS accepts organizations that have a point of view is accepted, the IRS requires tax-exempt media outlets that are organized and operated for educational purposes, to present "a full and fair exposition of the facts".<sup>143</sup>

The IRS has attempted to distinguish educational organizations from those engaged in non-educational advocacy. However, this has been a challenging task triggering a good amount of litigation, including First Amendment challenges. Until 1980, the IRS relied upon a subjective, viewpoint-based standard set forth in the Treasury Regulations for this distinction. A 1967 IRS ruling provided four criteria an organization engaged in publishing must meet to qualify for section 501(c)(3) exemption:

1. The content of the publication must be educational;
2. The preparation of the material must follow methods generally accepted as educational in character;
3. The distribution of the materials must be necessary or valuable in achieving the organization's exempt purpose; and
4. The manner in which the distribution is accomplished must be distinguishable from ordinary commercial publishing practices.

On these grounds, the IRS denied in 1977 tax-exempt status to a not-for-profit newspaper on the grounds that its operations were 'indistinguishable from ordinary commercial publishing practices.' This IRS test was however ruled unconstitutional in 1980. This standard was applied in *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980). The not-for-profit media group published a free monthly newspaper, contained articles, editorials, calendars of events, and more information of interest to women. The IRS considered that the newspaper had failed to satisfy the full-and-fair-exposition requirement by printing unsupported opinion. The court found that the publication of a

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<sup>142</sup> Bruce R. Hopkins and Jody Blazek, *Private Foundations: Tax Law and Compliance*. Hoboken, N.J. Wiley, 2014, p. 19.

<sup>143</sup> Taylor, 2011, op cit., p. 73.

newspaper involved a First Amendment right, which had been constrained by an unconstitutionally vague standard.<sup>144</sup>

In *National Alliance v. United States*, 710 F.2d 868 (D.C. Cir. 1983), the court was asked to decide whether the publications of a white supremacist group could be qualified as educational within the meaning of §501(c)(3). Since at stake was the diffusion of racial hatred and anti-Semitism, the court concluded that the purpose of this organization could not be qualified as educational. Following this case, the IRS has continued placing more emphasis on certain elements that might reveal that a certain organization does not have an educational purpose, such as the lack of support for the organization's viewpoints, distortion of facts, and the use of inflammatory language.<sup>145</sup>

The IRS now employs the following methodology test codified in Revenue Procedure 86-43:

The presence of any of the following factors in the presentations made by an organization is indicative that the method used by the organization to advocate its viewpoints or positions is not educational:

- a) The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications.
- b) The facts that purport to support the viewpoints or positions are distorted.
- c) The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.
- d) The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.
- e) [Section 3].04 There may be exceptional circumstances, however, where an organization's advocacy may be educational even if one of more of the factors listed in section 3.03 are present. The Service will look to all the facts and circumstances to determine whether an organization may be considered educational despite the presence of one or more of such factors.

In 1994, the constitutionality of Revenue Procedure 86-43 was challenged in *Nationalist Movement v. Comm'r*, 102 T.C. 558, 588-89. In this case, the petitioners had argued that this revenue procedure, addressing whether advocacy by an organization is educational within the meaning of section 501(c)(3), was vague and overbroad. The Revenue Procedure survived however the First Amendment challenge in this case. The Tax Court affirmed that "tax

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<sup>144</sup> Taylor, 2011, op cit., p. 73.

<sup>145</sup> Taylor, 2011, op cit., p. 75.



exemption [was] a privilege derived from legislative grace, not a constitutional right” (Christian Echoes Natl. Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972); General Conf. of the Free Church v. Commissioner, 71 T.C. at 931). In addition, the Supreme Court has rejected ‘the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State’ (Cammarano v. United States, at 515 (Douglas, J., concurring)). Revenue Procedure 86-43 was not judged unconstitutionally vague or overbroad since its provisions are “sufficiently understandable, specific, and objective both to preclude chilling of expression protected under the First Amendment and to minimize arbitrary or discriminatory application by the IRS. The revenue procedure focuses on the method rather than the content of the presentation.”

#### *Other legal sources*

The text of section 501(c)(3) is only the starting point of the legal framework applicable to tax-exempt organizations. The IRS interprets this section in light of a legal framework, summarized in the following table<sup>146</sup>:

**Table I: Legal Framework Not-for-profit Organizations**

Source of Authority	Description
<b>Rulings by US Federal Courts</b>	Judges in the United States federal court system can be called upon to interpret Section 501(c)(3) and applicable regulations in the course of reviewing IRS decisions on applications for tax exemption under the statute. These rulings are normally binding on the IRS.
<b>Rulings by the US Tax Court</b>	The United States Tax Court is a special court created by Congress pursuant to Article I of the US Constitution to hear certain cases relating to tax issues. The decisions of the Tax Court can be appealed to the United States Courts of Appeals in the normal federal court system.
<b>Treasury Regulations</b>	First promulgated in 1960 and amended thereafter, Treasury Regulations are “issued by the Internal Revenue Service and Treasury Department to provide guidance for new legislation or to address issues that arise with respect to existing Internal Revenue Code sections.”
<b>IRS Revenue Rulings</b>	“A revenue ruling is an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties and regulations. It is the conclusion of the IRS on how the law is applied to a specific set of facts.”
<b>IRS Revenue Procedures</b>	“A revenue procedure is an official statement of a procedure that affects the rights or duties of taxpayers or other members of the public under the Internal Revenue Code, related statutes, tax treaties and regulations and that should be a matter of public knowledge.”

<sup>146</sup> Hermes, 2012, op cit.

<p><b>Other IRS decisions: Private Letter Rulings</b></p>	<p>“A private letter ruling, or PLR, is a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer's specific set of facts. ... A PLR is issued in response to a written request submitted by a taxpayer and is binding on the IRS if the taxpayer fully and accurately described the proposed transaction in the request and carries out the transaction as described. A PLR may not be relied on as precedent by other taxpayers or IRS personnel.”</p>
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### 3. Do charities/tax laws and regulations permit news organizations to be charities/tax exempt organizations that can receive tax deductible gifts?

Although the not-for-profit sector rules has many disadvantages for media outlets—most importantly, the restrictions on raising capital and restrictions on advertising—it also offers several advantages that are particularly relevant, considering the financial challenges media organizations currently face. One of the most important advantages of being granted tax-exempt status is the possibility to receive tax deductible gifts under sections 501(c)(3) and 170 IRC:

*Organizations described in section 501(c)(3) (...) are eligible to receive tax-deductible contributions in accordance with Code section 170.*

The not-for-profit structure frees news outlets from the constant pressure to increase short-term profits that has sometimes distracted for-profit news organizations from their journalistic mission (FCC, 2011). The fact that donations to not-for-profit media are tax deductible serves as an incentive for citizens to lend financial support to organizations whose missions they value (FCC, 2011). Individuals and corporations can thus deduct, subject to varying limitations, an amount equivalent to the value of a contribution made to a qualified charitable done (IRC §170(a)(1). Under federal law a ‘charitable contribution’ is ‘a gift to or for the use of a qualified charitable entity, such as a private foundation’.<sup>147</sup> The extent to which this charitable contribution will be tax deductible depends on whether the charitable recipient is a public charity or a private foundation. For example, in the case of private (non-operating) foundations, the charitable contribution is limited to 30% of adjusted gross income for cash, whereas in private operating foundations and publications cash contributions are limited to 50%.<sup>148</sup>

### 4. Are there new organizations that are not charities or tax-exempt that are able to receive gifts or grants through some other structures or means?

According to the Pew Research Center, a significant number of not-for-profit media outlets (roughly two-thirds of the 172 not-for-profit news outlets analyzed in Pew Research are sponsored by another organization) is not independent.<sup>149</sup> This sometimes means that some media outlets are integrated in public charities or are part of complex structures which may allow them to receive indirectly

<sup>147</sup> Hopkins and Blazek, 2014, op cit., p. 701.

<sup>148</sup> Hopkins and Blazek, 2014, op cit., p. 717.

<sup>149</sup> Pew Research Center. NonProfit Journalism: A Growing but Fragile Part of the US News System, June 10, 2013, available at <http://www.journalism.org/2013/06/10/nonprofit-journalism>.

charitable donations. In fact, a number of charitable media outlets are not qualified as tax-exempt not-for-profits under 501(c)(3) IRC. As mentioned above, the constraints regarding the content of the news, interaction with politics, and the sources of revenue may discourage a number of outlets. According to the Pew Research Center, only a small number of not-for-profit media outlets are in fact independent tax-exempt charities, the majority of the outlets that present themselves as not-for-profit are incorporated in foundations or are integrated in other structures so as to benefit directly or indirectly from charitable contributions.

#### *Media hybrids: L3C and others*

Since 2008 a number of media hybrids have emerged. This is the case of low-profit limited liability corporations, for-profit media outlets with ‘affiliated’ not-for-profits investigative funds (e.g., the Huffington Post Investigative Fund); and for-profit media corporations that accept funds from foundations and not-for-profits to finance certain areas of coverage.<sup>150</sup> These hybrid entities blur the boundaries between not-for-profit and for-profit organizational ownership types, while at the same continuing to pursue charitable goals.<sup>151</sup> These hybrid entities also provide a more modern and efficient alternative to not-for-profits particularly in the media sector, at a time when raising capital might be challenging.<sup>152</sup>

Low-profit limited liability companies (‘L3C’) bring together a mix of foundations, trusts, endowments, not-for-profits and governmental companies in order to pursue social and charitable objectives while operating according to a for-profit revenue model. It is an entity somewhere between a 501(c)(3) not-for-profit organization and a limited liability company.<sup>153</sup> This legal form of business was created in order to solve the challenges of not-for-profit corporations.

State law governs L3C; L3C have only been very recently authorized in most states. A L3C is a social enterprise with stated social goals (usually educational or charitable), which combines the legal and tax benefits of a traditional limited liability company, and the social benefits and goals of not-for-profit organizations. L3C are designed to facilitate program-related investments by private foundations.<sup>154</sup> These program-related investments made by not-for-profit tax-exempt private foundations are intended to support a charitable project. L3C might be particularly interesting structures for newspapers and publishers.<sup>155</sup> Although a L3C may have a charitable purpose, this type of legal

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<sup>150</sup> James Hamilton, *The Road Ahead for Media Hybrids: Report of the Duke Nonprofit Media Conference*, *Duke Sanford, Center for Strategic Philanthropy and Civil Society*, 2009, available at [http://www2.sanford.duke.edu/nonprofitmedia/documents/DWC\\_Conference\\_Report.pdf](http://www2.sanford.duke.edu/nonprofitmedia/documents/DWC_Conference_Report.pdf)

<sup>151</sup> Rachel Culley and Jill R. Horwitz, *Profits v. Purpose: Hybrid Companies and the Charitable Dollar*, *Law & Economics Working Papers*, Paper 48, 2014, available at [http://repository.law.umich.edu/law\\_econ\\_current/art48/](http://repository.law.umich.edu/law_econ_current/art48/).

<sup>152</sup> Culley and Horwitz, 2014, op cit.

<sup>153</sup> Bruce R. Hopkins, *The Tax Law of Charitable Giving*. Hoboken, N.J., Wiley, 2014.

<sup>154</sup> Jamie Hopkins, *Low-Profit Limited Liability Companies: High-Risk Tax Fad or Legitimate Social Investment Planning Opportunity?* *Cardozo Law Review De Novo*, 2014, pp. 36.

<sup>155</sup> Bruce R. Hopkins, 2014, op cit.

entity is not eligible for tax-exemption. L3Cs are treated as ‘pass-through entities’ but may also be taxed corporations. Since a L3C has a multi-tiered investment structure, the for-profit members will be subject to tax on income received, while the not-for-profit members will enjoy tax-free participation.<sup>156</sup>

Another alternative to non-for-profit media outlets has been developed through the creation of not-for-profit funds to support for-profit media outlets. The Huffington Post Investigative Fund, for example, is a stand-alone entity chaired by Arianna Huffington and funded by donations from the Atlantic Philanthropies and the Huffington Post. The creation of an affiliated not-for-profit is advantageous since the Huffington Post Investigative Fund can receive tax-deductible donations and grants from foundations interested, for example, in supporting watchdog reporting.<sup>157</sup>

#### *Investigative reporting at universities*

A number of US universities host investigative reporting units, which can either be situated within the journalism department or be operated as stand-alone not-for-profit entities. The Wisconsin Center for Investigative Journalism at the University of Wisconsin and the New England Center for Investigative Reporting situated at Boston University are examples of these forms of not-for-profit journalism which can often benefit from the tax-exempt status of their hosting universities. The Conversation, for example, besides being a public charity with a tax-exempt status, it also works closely with universities, spending their budget uniquely on their editors and social media.<sup>158</sup> The Conversation publishes articles authored by academics, provides them media training, and is funded by universities.

### **5. Have recent efforts been made to permit newspapers, digital media, and other media to become charities? By whom? With what outcomes?**

#### *Newspaper Revitalization Act*

In 2009, Senator Cardin tried to meet the concerns of not-for-profit journalism and the growing crisis in the sector by proposing the Newspaper Revitalization Act. This bill failed but attempted to revise the applicable federal tax rules to not-for-profit media so as to recognize journalism as a vital public service. This bill aimed to protect local and community newspapers, which often have more difficulties in demonstrating their educational purpose.

The Newspaper Revitalization Act would have permitted newspapers to operate as not-for-profits for educational purposes under the IRC, conferring them a similar status to public broadcasting companies.<sup>159</sup> The Newspaper

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<sup>156</sup> Bruce Hopkins, 2014, op cit.

<sup>157</sup> James Hamilton, 2009, op cit.

<sup>158</sup> Interview with Andrew Jaspan from The Conversation and Valerie Belair-Gagnon, March 25, 2015.

<sup>159</sup> Thomas Ferraro, US Bill Seeks to Rescue Faltering Newspapers’, *Reuters*, March 24, 2009, available at <http://www.reuters.com/article/2009/03/24/us-usa-congress-newspapers-idUSTRE52N67F20090324>.

Revitalization Act allowed newspapers that regularly publish local, national and international news to become tax-exempt not-for-profits on more favorable conditions than those provided in section 501(c)(3) IRC and its respective regulations. Under this bill, newspapers would still be free to report on a wide variety of issues, including political campaigns. However, not-for-profit newspapers would be prohibited from making political endorsements. As Senator Cardin explained:

*Converting to not-for-profit status may not be the optimal choice for some newspapers -- particularly those that rely on a significant revenue stream -- but this legislation would provide an alternative business model that could help many newspapers keep operating.*<sup>160</sup>

Cardin's bill was however unsuccessful in Congress, proving to be unable to 'revitalize' not-for-profit media. House and Senate members of the Joint Economic Committee were not very enthusiastic regarding the discussion of this bill. The Washington Times reported that only three of the 20 committee members showed up for the September 24 hearing on newspapers.<sup>161</sup> In 2009, Robert Picard remarked that this bill, despite its good intentions, had a limited scope and would create some room for abuse. According to Picard, the bill would only be appealing to "very few dailies and most neighborhood and community papers [would] have difficulties complying with its content and advertising requirements. Even with tax exempt status, the costs of creation, publishing, distribution of a newspaper probably [could] not be covered by many publishers with a 50 percent ad limit, unless they are especially effective at raising charitable contributions over time".<sup>162</sup>

#### *Council of Foundations/Knight Foundation*

In 2013, the Council of Foundations supported by the Knight Foundation addressed once again some of the abovementioned challenges of obtaining tax-exempt status in a thorough report on the sector. The *Not-for-profit Media: Toward Creating a More Informed Public* report offered a number of suggestions to improve the IRS approach to not-for-profit media applications:<sup>163</sup>

- a. The IRS methodology for analyzing whether a media organization qualifies for exemption should not take into account irrelevant operational similarities to for-profits;

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<sup>160</sup> Benjamin L. Cardin, 'A Plan to Save Our Free Press', *Washington Post*, April 3, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/02/AR2009040203310.html>.

<sup>161</sup> <http://www.washingtontimes.com/news/2009/sep/24/paper-cut-lawmakers-slam-newspaper-bailout-idea>.

<sup>162</sup> Robert G. Picard, 'Analysis of the Newspaper Revitalization Act', *Media Business Blog*, March 25, 2009, available at <http://themediabusiness.blogspot.com/2009/03/analysis-of-newspaper-revitalization.html>.

<sup>163</sup> Council on Foundations, 'The IRS and Nonprofit Media: Toward Creating a More Informed Public, Report on the Nonprofit Media', *Knight Foundation*, 2013, <http://www.cof.org/sites/default/files/documents/files/Nonprofit-Media-Full-Report-03042013.pdf>.

- b. The IRS should focus on whether the media organization is engaged primarily in educational activities that provide a community benefit, as opposed to advancing private interests, and whether it is organized and managed as a not-for-profit, tax-exempt organization.

Efforts have also been made in other reports (Federal Communications Commission) and sectoral journals and digital outlets (e.g., the *Columbia Journalism Review* and the Digital Media Law Project) to call for a modernization of the IRS assessment of not-for-profit media in order to consider the following aspects:

1. The IRS should acknowledge that the way media outlets produce and support their work might be more similar to the commercial sector than other not-for-profits. Instead, one of the elements the IRS often looks at is how distinguished a not-for-profit's business model is from that of a commercial enterprise. However, nowadays, with the digital revolution not-for-profits and for-profits use similar publication techniques.
2. The IRS has also been asked to rethink its position regarding volunteer labor, namely that to avoid resembling commercial entities, not-for-profit media 'should make heavy use of volunteer labor'. However, it is worth noting that many public charities such as research hospitals and universities tend to employ professional staff to execute their exempt functions (FCC, 2011)

## **6. What do tax authorities, parliamentarians/legislators, and media personnel think about charitable organizations?**

An accurate analysis of the perception of not-for-profit media would have implied a thorough empirical research, which is outside the scope of this report. Instead, an overview of the interaction between not-for-profit media outlets and a number of different actors is provided in this section. Our analysis focuses primarily on the IRS which has been criticized for the use of outdated methodology and the delays in processing 501(c)(3) applications filed by not-for-profit media outlets.

### *The IRS*

While it might be hyperbolic to argue that not-for-profit media will save journalism,<sup>164</sup> the truth is that the not-for-profit journalism movement has diversified media and allowed local communities to regain access to local news and investigative journalism.<sup>165</sup> Journalism used to be historically regarded as a privileged area of governmental intervention and support through mail subsidies and discounts, public notice publication mandates and tax breaks. However, this public intervention mentality has not been visible in the last years in the IRS approach to the applications filed by the growing number of not-for-profit media outlets. Instead, obtaining the 501(c)(3) tax-exempt status has proven to be a

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<sup>164</sup> Marion Smith and R. Fremont. Can Nonprofits Save Journalism? Legal Constraints and Opportunities, Joan Shorestein Center, 2009, available at [http://shorensteincenter.org/wp-content/uploads/2012/03/can\\_nonprofits\\_save\\_journalism\\_fremont-smith.pdf](http://shorensteincenter.org/wp-content/uploads/2012/03/can_nonprofits_save_journalism_fremont-smith.pdf)

<sup>165</sup> Free Press, Nonprofit Journalism, Free Press, 2015, available at <http://www.freepress.net/nonprofit-journalism>.

challenging and confusing process (Digital Media Law Project, 2014c). The public interest dimension of journalism seems to be less visible in the IRS approach to not-for-profit media, which according to the Council of Foundations seems to ‘undervalue journalism’ by processing applications in an inconsistent manner.<sup>166</sup>

A number of reports and media outlets have criticized the IRS for applying an outdated policy framework and delaying the granting of tax-exempt status, impeding not-for-profit media outlets from operating and accepting charitable contributions.<sup>167</sup>

Obtaining a charitable status is however not challenging for all not-for-profit media outlets: While some organizations affiliated with religious groups and educational institutions will easily be granted a tax-exempt status, this tax exemption has proven to be more difficult for the traditional and local newspapers. At a time when these media outlets are trying to convert to not-for-profits in order to diversify their revenues, they might find the limitations imposed by the IRS difficult to comply with since a number of newspapers are still dependent on advertising and subscriptions.<sup>168</sup> Revenues from subscriptions have been only accepted when the not-for-profit could demonstrate that its efforts at not-for-profit fundraising had been unfruitful.<sup>169</sup>

The abovementioned challenges have been behind the effort to change the current tax framework for not-for-profit media proposed by Senator Cardin. This bill would have allowed newspapers to maintain their revenues through subscriptions and advertising, while receiving at the same time local community support.<sup>170</sup> The IRS framework does not take into account the importance that advertising has for the media sector, and the difficulty in attracting charitable gifts in the periods following the initial endowments.

Almost all of applications for tax-exempt status under §501(c)(3) have taken a number of months and many applications have been delayed. The IRS has revealed caution in its approach but it has been criticized for blocking many innovative not-for-profit journalism endeavors. While some applications for tax-exempt status were decided within a few months (e.g., The Austin Bulldog), others have taken up to three years. For example, the Raleigh Public Record filed for tax-exempt status in August 2009, but this status was only granted on February 22, 2010; the San Francisco Public Press filed for tax-exempt on January 3, 2010, but was only granted this status on August 31, 2012. *Eye on Ohio*, a digital media outlet of investigative reporting and statewide news, had to

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<sup>166</sup> Council of Foundations, 2013, op cit.

<sup>167</sup> Council of Foundations, 2013, op cit.; Hermes, 2012, op cit.

<sup>168</sup> NPR, Sen. Cardin Wants Bailout for Struggling Newspapers. NPR, October 5, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=113495825>.

<sup>169</sup> Hermes, 2012, op cit, p. 17; *Pulpit Resource v. Commissioner*, 70 T.C. 594, 610 (1978).

<sup>170</sup> NPR (2009), op cit.

wait almost a year and a half to see its tax-exempt status approved by the IRS in 2014.<sup>171</sup>

According to the Council of Foundations, a not-for-profit membership association of grant-making *foundations* and corporations, these delays and the fact that there is some confusion regarding the procedure of obtaining tax-exempt status, “may be inhibiting not-for-profit entrepreneurs trying to address the information needs of communities”.<sup>172</sup>

The public interest in not-for-profit media is however visible in the news published by these tax-exempt outlets. Those outlets that won IRS approval before the agency’s clamp-down began, such as ProPublica, the Texas Tribune, MinnPost and Voice of San Diego, are covering issues the mainstream media have largely abandoned, winning awards and engaging communities in the process.

The IRS has traditionally considered that organizations engaged in investigating other journalists are engaged in educational activities. However, journalism in itself has not been considered educational, this purpose has to be demonstrated. For example, when Institute for Not-for-profit News (INN), the consortium of journalism not-for-profits, was granted tax-exempt status after two years, the IRS required this organization to ‘remove the word ‘journalism’ from the purpose clause in its articles of incorporation’.<sup>173</sup>

The Knight Foundation has recommended an update of the methodology and framework used by the IRS for granting tax-exempt status by focusing on how media organizations provide a community benefit and by taking into account the differences between not-for-profit and for-profit media outlets.<sup>174</sup> The Council of Foundations has underlined that more recently the IRS started to process again the tax-exempt application requests filed by not-for-profit media outlets,<sup>175</sup> revealing a potentially more positive attitude toward not-for-profit media.

### *Legislators and regulators*

As mentioned above, in 2009 a bill proposed by Senator Cardin tried to change federal law in order to protect not-for-profit newspapers, guaranteeing that certain specific features of the sector are taken into account. The bill failed in Congress and not much more legislative activity has been detected in the last

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<sup>171</sup> Justin Ellis. A Change in the IRS Process for Granting Tax-Exempt Status Could Be a Boon to Nonprofit News’, *Nieman Lab*, July 16, 2014, available at <http://www.niemanlab.org/2014/07/a-change-in-the-irs-process-for-granting-tax-exempt-status-could-be-a-boon-to-nonprofit-news>.

<sup>172</sup> <http://www.cof.org/sites/default/files/documents/files/Nonprofit-Media-Full-Report-03042013.pdf>

<sup>173</sup> Justin Ellis. Report: The IRS’s “antiquated and counterproductive” rules are hurting nonprofit news orgs’, *Nieman Journalism Lab*, March 4, 2013, available at <http://www.niemanlab.org/2013/03/report-the-irss-antiquated-and-counterproductive-rules-are-hurting-nonprofit-news-orgs>.

<sup>174</sup> Council of Foundations, *The IRS and Nonprofit Media: Toward Creating a More Informed Public*, Report on the Nonprofit Media’, Knight Foundation, 2013.

<sup>175</sup> Council of Foundations, 2015, op cit.



years. The Federal Communications Commission analyzed the challenges of not-for-profit media in 2012, issuing a number of recommendations. Besides the tax recommendations explicitly mentioned in other sections of this report, the FCC stated that it would be ‘hugely beneficial if an Internet service provider (ISP) could donate free Internet service to a not-for-profit website or a public radio station (FCC, 2011). This recommendation reminds us of the zero-rating services provided by Wikipedia, Facebook or Google, for example, to developing markets. Zero-rating takes place when “Internet content providers — like Facebook or Google — cut a deal with network providers, allowing the networks’ subscribers to access the content providers’ sites without incurring data charges”.<sup>176</sup> The FCC appeared to suggest in 2011 that such deals would also be available to not-for-profit media outlets, expanding their readership by providing free internet access to their audience.

#### *Media Personnel and other parties*

In theory, not-for-profit media is not necessarily on the same relevant market as for-profit media. Journalism organizations, which are granted tax-exempt status, are relatively limited on the type of material they are allowed to publish without losing their charitable status, the types of funding they can receive, and the disposition of their earnings (Digital Media Law Project, 2014). However, in practice, for-profit media outlets seem to have mixed feelings toward not-for-profit media outlets. While some see successful not-for-profits such as ProPublica, Kaiser Health News, the Center for Investigative Reporting, Voice of San Diego, the Texas Tribune as important partners and ‘producers of socially necessary, but commercially difficult, investigative and public service journalism’; other for-profits regard not-for-profit media with suspicion.<sup>177</sup> A number of media players have questioned the validity, legitimacy, and sustainability of the not-for-profit news movement. A number of op-ed pieces, blog posts and Tweets by Jeff Jarvis have questioned whether ‘mission-driven organizations with limited access to and, therefore limited number of, financial resources [could] legitimately, sustainably and ethically perform the core public accountability functions of the fourth estate’.<sup>178</sup> In 2014, CUNY Professor Jeff Jarvis criticized journalism philanthropy in a series of Tweets and in his blog, leading one observer to note that Jarvis claims that:

*he is concerned that grant-makers supporting nonprofit news sites don’t put their money into the organization’s infrastructure, but concentrate on operations and fail to see the importance of supporting news infrastructure investment.*<sup>179</sup>

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<sup>176</sup> Erica Portnoy. Benefits and Long-Term Uncertainty. *Equal Future*, August 6, 2014, available at <https://www.equalfuture.us/2014/08/06/zero-rating-analysis>.

<sup>177</sup> Kevin Davis. Greater Scrutiny for Nonprofit News?, *NetNewsCheck*, April 3, 2014, available at <http://www.netnewscheck.com/article/33099/greater-scrutiny-for-nonprofit-news>.

<sup>178</sup> Davis, 2014, op cit.

<sup>179</sup> Rick Cohen. Is Philanthropy Really Tearing the Wings Off New Journalism? *Nonprofit Quarterly*, March 11, 2014, available at <http://nonprofitquarterly.org/2014/03/11/is-philanthropy-really-tearing-the-wings-off-new-journalism>.

While it is true that one of the struggles of not-for-profit journalism is to find new sources of revenue after the initial starting grants (Pew Research, 2013), this skepticism toward not-for-profit media reveals deeper concerns, namely regarding the influence that some charitable donors might have on the content of the not-for-profit organizations they create and fund. This concern was raised in 2014 regarding Pierre Omidyar's potential influence on First Look coverage regarding Ukrainian causes.<sup>180</sup>

## **7. How does the presence or lack of charitable status affect the development of not-for-profit news organizations?**

The presence or lack of charitable status can affect not-for-profit media in a number of ways: on the one hand, the charitable status constrains the contents that the media outlets are allowed to publish and their revenue model; on the other, the very same charitable status allows former for-profits to reemerge as not-for-profit outlets, accept the support of local communities and philanthropists, and continue the mission of informing and educating the public. The lack of this status or the delay in granting it (see above) can impede small and local media outlets from continuing to operate. However, in this section, the potential impact of funders on the contents and targeted audience of not-for-profit media outlets is also discussed.

### *Legal influence of tax-exempt status on the development of not-for-profit media*

Since not-for-profit media outlets often rely on the 'educational' purpose to receive tax-exempt status and have to comply with a number of federal and state rules, this tax-exempt status has an inevitable impact on what they publish (see above more on the IRS methodology to evaluate the 'educational purpose') and how they are funded. The federal tax-exempt status imposes the following limitations (Digital Media Law Project, 2014):

- a) The media outlet revenue model must depend primarily on public support such as foundation grants or individual donations, *rather than* on commercial revenue such as advertising or subscription fees;
- b) The not-for-profit organization is not allowed to be affiliated with a for-profit organization in any way that would allow the former controls the not-for-profit's activities;
- c) The staff's earnings must be consistent with the operation of the organization for the benefit of the public rather than personal profit;
- d) The editorial process should aim to select and develop content that educates the not-for-profit media outlet's audience, rather than covering news of popular interest;
- e) The content published must be directed at members of the public, rather than at a private group; and
- f) The not-for-profit media outlet is limited in the extent to which it can cover political issues in a partial way. As mentioned above, not-for-profit

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<sup>180</sup> Rick Cohen. The Role of Pierre Omidyar and Big Charity in the Ukraine. *Nonprofit Quarterly*, March 4, 2014, available at <http://nonprofitquarterly.org/2014/03/04/the-role-of-pierre-omidyar-and-big-charity-in-the-ukraine>.

media outlets are not allowed to endorse or oppose political candidates and to support or oppose the passage of any bill.

### *Practical influence of tax-exempt status on the development of not-for-profit media*

#### Local media and investigative journalism

The tax-exempt status granted to not-for-profit media appears to protect in practice certain forms of news production, namely journalism that aims to inform and educate local communities, and investigative journalism. According to the Pew Research Center, not-for-profit media has stimulated the development of several local news ecosystems and most not-for-profit media outlets focus on the publication of local news.

Not-for-profit media has also been a ‘salvation boulevard’ for for-profit organizations with an investigative character facing financial problems. Since 2008, a number of for-profit newspapers and other media outlets on the verge of bankruptcy have converted to non-profit organizations and applied for a 501(c)(3) status in order to be able to continue their activities. This was the case of the Oklahoma Watch, which produces investigative journalism on relevant public policy issues in the state of Oklahoma. This organization converted to a not-for-profit organization in 2011 and applied for tax-exempt status on July 15, 2013. The IRS granted this organization 501(c)(3) status on November 17, 2013.<sup>181</sup>

The Council of Foundations, while lamenting the IRS outdated approach, noted that not-for-profit investigative journalism has served the public interest in a number of ways. Not-for-profit media outlet such as ProPublica, the Center for Public Integrity, and the Center for Investigative Reporting have covered misuses of public money, exposing controversial subjects such as police misconduct or misdiagnosis of returning war veterans.<sup>182</sup>

#### Impact of Funders

One of the challenges of not-for-profit media refers to the impact that funders might have on the content published by these outlets. Besides the abovementioned ‘for-profit vs. not-for-profit’ dialogue, a few words should be said about not-for-profit media funders and their impact on the development of journalism. Earlier this year, Media Impact Funders released the report “Funder Perspectives: Assessing Media Investments,” which was based on survey responses and interviews with 30 large and small foundations. These foundations were asked about the impact of the journalism projects they fund.<sup>183</sup> The report concluded that the impact of the funders on the type of news produced was varied and difficult to assess according to the same metrics. The survey revealed that:

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<sup>181</sup> Digital Media Law Project, Successful Journalism Applications for Section 501 (c)(3) Status. *Digital Media Law Project, 2014*, available at <http://www.dmlp.org/irs/applications>.

<sup>182</sup> Council of Foundations, 2013, op cit.

<sup>183</sup> Media Impact Funders. Funder Perspectives: Assessing Media Investment. *Media Impact Funders*, 2015, available at [http://mediaimpactfunders.org/wp-content/uploads/2015/01/MIF\\_Funder-Perspectives.pdf](http://mediaimpactfunders.org/wp-content/uploads/2015/01/MIF_Funder-Perspectives.pdf).

- a) The funders target different audiences: while 64% of the them invest in media projects that target national audiences, the others focus on smaller numbers also reporting local (33%), regional (40%) or international (30%) targets.
- b) The funders have diverse goals for their media investments: only 23% of respondents make grants in a dedicated media program, with others reporting that they fund media through other program areas (33%), through a combination of media-specific and other program areas (27%) or other options outside of these choices, including partnerships and general programs (17%).
- c) The funders support media outlets that publish on a wide variety of topics, such as education (47%), health (40%), environment (37%), technology (10%), and housing (7%).

The Media Impact Funders also concluded from multiple interviews that a number of important funders were not supporting media for the sake of journalism but rather because this was a form of “funding social or systemic change and using media to advance specific goals”.<sup>184</sup>

### Summary of the contemporary situation

The US has more not-for-profit media than the other nations in the study, but its charity and tax laws do not in themselves provide a more favorable setting. Although there has been support for altering laws so news enterprises could more easily achieve charity status, efforts to do so have languished. Organizations that have received charitable status have structured themselves to meet accepted criteria, often educational, scientific, or literary, or work through other charitable institutions.

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<sup>184</sup> Media Impact Funders (2015), p. 9.

### Section III: Cross-National Comparaison

Not-for-profit media exist with charitable status in the United Kingdom, the United States, and to a lesser degree in Australia. Not-for-profit media entities have not been directly identified in Canada or Ireland, with the exception of a few media outlets associated with other organizations with charitable status such as religious and educational institutions.

All five jurisdictions in this report have relatively specific laws and regulations in place for granting the legal or tax benefits inherent to the charitable status or equivalent tax benefits which not-for-profit media outlets could benefit from. However, despite clear similarities (for example, the difficulty in qualifying journalism as a charitable goal) these countries take varying approaches to charities and tax law that differ in the extent to which it is possible for media organizations to achieve not-for-profit status or enjoy similar tax concessions and the benefits of tax deductible gifts. Also, in some of these countries the lack of legislative or regulatory clarity and of legislation that takes into account the new socioeconomic and digital contexts faced by media organizations might delay the legal process of obtaining tax-exempt and/or charitable status. The authorities and frameworks for determining status and challenges in obtaining status and their effects on media are outlined in Table 1.

**Table 1:**

	<b>Authorities</b>	<b>Legal Framework</b>	<b>Obstacles</b>
<b>Australia</b>	ACNC – charity registration  Australian Taxation Office	Charities Act 2013 (Federal)  State and local laws  Charities eligible for tax exempt status and other tax benefits, rebates, and fringe benefits  Charity status does not confer automatically deductible gift recipient (DGR) status (Income Tax Act)	Judicial precedent: newspaper not a charity  Since 2011: all media activities must further charitable purposes  DGR status difficult to obtain
<b>Canada</b>	Canada Revenue Agency – Charity Registration  Provinces and Federal Government Incorporation	Common Law Definition of Charity and specific Charity regulations enforced by the CRA. Appeals to the Federal Court of Appeal	No charitable status per se available for “media”. Use of media is acceptable for implementation of a charitable object

		Incorporation as of right with objects chosen by the incorporator	Lack of codified Definition of “charity”, casuistic decision  Not-for-profit organizations can receive tax-deductible gifts but cannot issue receipt (as opposed to charities)
<b>Ireland</b>	Charities Regulatory Authority  Revenue Commission	2009 Charity Act  1997 Tax Consolidation Act	Inconsistent definition of charity between Charities Regulatory Authority and the Revenue Commissioners  Narrow interpretation of the definition of “charitable purposes” by the Revenue Commissioners
<b>United Kingdom (England and Wales)</b>	HM Revenues and Customs  The Charity Commission	Charities Act 2011  Common law	Lack of overt recognition of journalistic activity and output within existing descriptions of charitable purposes  Difficult to evidence and demonstrate public benefit as set out in the guidance  Burdensome registration process
<b>United States</b>	Internal Revenue Commission	§501(c)(3) IRC State law	Outdated approach to the interpretation of “charitable purpose” by the IRS and procedural delays

There are no signs that media organizations are treated differently than other types of applicants regarding applications to achieve charitable tax concessions and the ability to receive tax-deductible contributions. However, they are not specifically cited as eligible in the laws either and thus must meet the other more general criteria. This makes it more difficult to achieve charitable status in some of the countries studied, such as Australia, Canada, and the United States.

This report shows that the primary hindrances to achieving charitable status for media organizations are primarily definitional, procedural, political, and

commercial. The major hindrance in the countries this report studies is the legal definition of charitable purposes and the ability of media organizations to match those definitions. For example, Canada does not have a defined term for charity. The definition is extended by judicial decision. Another hindrance includes over-burdensome registration requirements and processes for applicants. A lack of formal applications for media and a legal case-by-case approach, such as in the case of Ireland, allows regulators considerable leeway and constrains media organization seeking not-for-profit status because of its uncertainties. In Canada, news organizations do not qualify for charity status as such and few have sought status through other structures. In the US, not-for-profit media may not enter into direct political activities, the interaction between political goals, the sources of revenue, and the news content may hinder news outlets from becoming not-for-profit media organization. In England and Wales, charities cannot exist for a political purpose; political campaigning, or political activity, must be undertaken by a charity only in the context of supporting the delivery of its charitable purposes. There are specific restrictions for political activities during election periods. The Transparency Lobbying, Non-party Campaigning and Trade Union Administration Act introduced these new rules. In the US, the IRS has discretion in applying section 501(c)(3) because no specific tax exemptions are established in the law for journalism. Additionally, the IRS frowns upon advertising in not-for-profit media outlets and could put at stake the tax-exempt status of media organization.

Despite these challenges, some charitable/tax exempt news organizations exist in various forms in each country. The most prevalent type is charity-owned and controlled journalism in which charitable organizations own or control non-charitable journalism-producing organizations. In the UK, human rights charities fall under this category.

The second category is charity-owned and controlled journalism in which charity itself produces journalism. In the US, the law might not provide specific tax exemptions for journalism, but a number of media organizations have been able to qualify as such, despite a long waiting period. The Conversation in Australia, the UK, and the US all fall into this category. In Australia few news organizations have access to tax deductions; tax deductibility is provided indirectly by an associated entity such as in the cases of Inside Story, Eureka Street and The Science Network Western Australia. Note that in Australia, local not-for-profit community broadcasters, including the Indigenous Broadcasters, also fall under this category. The Australian government support these organizations.

The third category is charity-supported journalism, in which non-charitable journalism-producing organizations and individuals receive support from charities and individuals. Charities producing news and news-related content but not defining themselves as news organizations (such as opendemocracy.net) fall into this category. In Ireland, most organizations of this kind are religious, such as Spirit Radio and Christian Radio. In the UK, the most common news-

related charities are dedicated to journalism education and training. Examples include the Guardian Foundation, BBC Media Action, and the Media Trust.

The authors of this report also identified the presence of hybrid legal structures allowing journalistic-related organizations to receive gifts/grants. These news organizations are merged into foundations, government aid, and educational structures. In the US, several not-for-profit media outlets do not qualify as tax-exempt not-for-profits under 501 (c) (3) IRC. Instead, some media outlets that are not-for-profit are housed within foundations or other structures so they can benefit from charitable contributions. Such outlets include the Huffington Post's Investigative Fund, the Wisconsin Center for Investigative Journalism at the University of Wisconsin, and the New England Center for Investigative Reporting at Boston University. Only a handful of media organizations are truly tax-exempt charities. In Ireland, the Sound and Vision fund for broadcast production allows all Irish broadcasters to bid for funds to produce public service content. Although this grant is non-market funding, 5% of the license fee is allocated to a fund administered by the broadcast regulator, the Broadcasting Authority of Ireland. Founded in 1978 in Québec, Canada, SODEP (Société de développement des périodiques culturels québécois), is a not-for-profit organization that promotes cultural magazines as well as provides administrative support to a selection of cultural magazines. It is important to note that in Canada, there are no large tax-exempt news organizations in operation. Small news organizations, such as university radio stations, could receive charitable status based on the fact that they educate students in radio operation. The same apply to media organizations operated by Aborigines for the Aboriginal community. These organizations could receive charitable status based on the Aborigines' special status in Canadian law. Therefore, hybrid structures allowing journalistic-related organizations to receive gifts/grants and other tax and public benefits are prevalent. However, this public support is not justified by their functions as media outlets.

Across nations, media organizations, some public actors, private foundations, and universities have made efforts to permit newspapers and other media to become eligible for tax benefits. There appears to be a generalized feeling that outdated legal structures are delaying or impeding the development of not-for-profit media. Although unsuccessful, US Senator Cardin's 2009 Newspaper Revitalization Act was an initiative aimed at allowing newspapers to restructure as not-for-profits, similar to broadcasting stations. In addition, in the last decade, several reports published by prominent institutions and private foundations have encouraged improvements in the IRS's approach to not-for-profit media. Examples include reports by the Council of Foundations and the Knight Foundation. The FCC has also suggested reviewing the tax code to support not-for-profit journalism. In the past years, several hybrid entities have emerged, to bridge the gap between not-for-profit social goals and for-profit business models. The now defunct Digital Media Law Project at Harvard<sup>185</sup> and

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<sup>185</sup> Digital Media Law Project. What is Section 501 (c) (3) and Is It Right for Your Organization? *Digital Media Law Project*, 2014, available at <http://www.dmlp.org/irs/what-is-501c3>; Digital



the *Columbia Journalism Review* also called for modernizations of the IRS not-for-profit media assessment. To date, in Australia, policy makers did not indicate willingness to consider or adopt changes to existing arrangements. The Australian Public Interest Journalism Foundation has conducted a campaign for philanthropic donations' tax deductibility for not-for-profit news organizations and public interest journalism, mainly investigative and quality journalism. Building on the US experience, the Inquiry acknowledged that: "the government could play a role in providing incentives for philanthropic investment in news production." It concluded that "at this stage there is not a case for government support."<sup>186</sup> Overall, across the nations in this study, efforts to permit newspapers and other media to become charities by media organizations, governments' bodies, foundations and universities have been palpable, yet weak and often unsuccessful.

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Media Law Project. Successful Journalism Applications for Section 501 (c)(3) Status. *Digital Media Law Project*, 2014 available at <http://www.dmlp.org/irs/applications>; Digital Media Law Project (2014). Tax-Exempt Journalism and the IRS. *Digital Media Law Project*, 2014, available at <http://www.dmlp.org/irs>

<sup>186</sup> Independent Inquiry into the Media and Media Regulation, Report to the Minister for Broadband, Communications and the Digital Economy, Commonwealth of Australia, Canberra, 2012.



## Section IV: Conclusions

The national reports provide a comprehensive picture of what is happening and not happening concerning not-for-profit media organizations and their abilities to obtain charitable status in each country. In addition, the reports clarify whether these organizations are struggling because of the existing legal frameworks and the potential lack of interest in these forms of ownership. The reports also provide legal, regulatory, and political perspectives on the issue.

Overall, in this report, we found that in the last decade the number of not-for-profit media organizations has increased significantly in all countries but Canada and Ireland. The interest in new business and funding models results from the digital shift and the economic crisis. This is particularly the rationale in the US where Pew Research has conducted empirical research (46% of the 172 not-for-profit digital media outlets which emerged between 1987 and 2012, were established in 2008 and 2009). By contrast, in Ireland, the relevance of not-for-profit media organizations appears to remain limited and restricted to organizations that also pursue religious purposes. In Australia, despite the growing interest in not-for-profit media, the difficulty to register as a charity or receive tax deductible gifts has not slowed down investment in the not-for-profit media sector, which appears to be characterized by significant diversity. In the US, on the contrary, the delayed and skeptical approach of the Internal Revenue Service (IRS) has been highly criticized and is viewed as an obstacle to development of the sector.

In the five countries analyzed in this report, global not-for-profit media outlets, such as The Conversation and national investigative journalism organizations, reveal the importance of independent and locally produced media activities that can serve local communities. These organizations play a central role in international and local media ecosystems. Most of these media organizations are digital. And with such organizations, these local or specialized communities can have access to information that national media would not cover otherwise.<sup>187</sup>

Not-for-profit operation and charitable status provide advantages and disadvantages to news organizations that must be individually considered by those contemplating their possibilities. Operating as not-for-profit entities frees organizations from the pressures of profit demands to focus on their journalistic missions, but does not free them from financial pressures overall. Receipt of charitable and tax-exempt benefits may prelude political activities (e.g. supporting candidates or parties) or forbid or limit activities that create commercial revenue (e.g. advertising).

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<sup>187</sup> Rasmus Nielsen (ed.), *Local Journalism: The Decline of Newspapers and the Rise of Digital Media*, London: I.B. Tauris, 2015.

## Legal frameworks

In the countries under analysis, not-for-profit media organizations are governed by both federal and state, provincial, local, and territorial laws depending upon national structure. In this report, we have focused on tax laws and regulations which determine the conferral of charitable or tax-exempt status and the ability to receive tax deductible gifts. We have observed that while an organization generally must operate on a not-for-profit basis to be able to be qualified as a charity (there are a few exceptions that allow charities to operate for-profit enterprises), not all not-for-profit organizations might be able to obtain a charitable status. This difference might be relevant and entitle organizations to additional tax benefits. For example, in Australia, charities are eligible for additional concessions from relevant state and territorial governments. In the US, not-for-profit media organizations also have to comply with both federal and state law, but tax-exemption is decided at federal level by the IRS. It is worth noting that charities may also benefit from different regimes in the context of other taxes (e.g., goods and services tax in Australia). However, this report focuses on income tax rather than on value added tax. For example, in the UK, newspapers are already not subject to VAT and Irish print newspapers benefit from a reduced VAT rate. However, such exemptions are losing significance in newspaper finances because of declining print circulation and increasing digital subscriptions, which are subject to VAT under European law.

At a time when a number of former for-profit media outlets are leaving the commercial sector and seeking donations and grants, charitable or tax-exempt legal status is essential both for their initial establishment and survival. The central legal actors in this process tend to be the national tax authorities (such as the US IRS). However, due to the growing political attention and specificity of the not-for-profit sector, in other countries specialized agencies have been recently created. Examples are the Australian Charities and Not-for-Profits Commission (ACNC) established in 2012 and the Irish Charities Regulatory Authority.

The diffusion of the not-for-profit media organization model has however encountered numerous legal and non-legal challenges. The main challenge resides in the assessment of the charitable status and/or eligibility for tax-exempt status. In none of these countries is journalism (investigative or not) regarded as a charitable purpose as such. Although not-for-profit media organizations often serve other commonly listed charitable purposes such as education and diffusion of religion, this conclusion implies a casuistic assessment.

## Charitable status

In all the five countries analyzed in this report, not-for-profit and charitable media organizations which are granted a tax-exempt or a similar preferential tax regime, must operate exclusively or primarily to accomplish one or more charitable or not-for-profit activities or objects. The understanding of what a charitable purpose is or should be is similar in the countries under analysis. Since journalism is not qualified as a charitable purpose as such, the most

relevant purposes for not-for-profit media outlets seeking a tax-exempt status have been education and religion.

A controversial theme in this context has been the connection with political parties, which is typically limited in the case of not-for-profit organizations and charities. In the countries under analysis, not-for-profit media outlets are not entitled to endorse political candidates. In England and Wales, while charities can campaign for a change in the law, policy or decisions where such change would support the charity's purpose, and can campaign to ensure that existing laws are observed, a charity cannot exist for a political purpose. This prohibition has been discussed in the US, England and Wales and it includes any purpose directed at furthering the interests of any political party, or securing or opposing a change in the law, policy or decisions. While a not-for-profit media organization or charity should be able to report on the enactment of a bill, it should not give its support to any one political party.

The not-for-profit requirement imposed in these countries does not mean that not-for-profit media organizations are entirely precluded from engaging in profitable activities. However, the extent to which they rely on paid memberships and advertisements varies from country to country. As a general rule, these activities should remain very limited as they can put at stake the tax-exempt status of a non-profit organization. This limitation is a source of concern in the media industry where after the initial funding to establish the not-for-profit organization, it might be very challenging to guarantee the continuation of the organization.

In general, it is difficult and onerous for a media organization to be granted charitable status. In the countries analyzed we have observed that this difficulty appears to result first either from the existence of an exhaustive list of charitable purposes which excludes journalism or offers a very limited interpretation of extant purposes; or the lack of the codification of the concept of "charity" (e.g. Canada and the US), discretion of tax authorities, and the existence of judicial precedents that do not take into account the new challenges faced by the media industry. To illustrate, in Australia, until the establishment of the Australian Charities and Not-for-profits Commission and the enactment of the *Charities Act 2013*, news organizations were generally unable to qualify for charitable status because of a precedent established by a 1934 High Court judgment [*Roman Catholic Archbishop of Melbourne v. Lawler*], which ruled that a newspaper was not a charitable object. In the US and in the UK, besides the list of typical charitable purposes such as education, reference is also made either to "charitable purposes" (US in the IRC) or "any other charitable purposes" (UK in the Charities Act 2011). This could allow for more flexibility in the assessment of not-for-profit media organizations which do not fit typical charitable purposes.

While in Canada there is no codified definition of charity, which often implies reliance on casuistic judicial decisions, in other countries the existence of a definition or a list of charitable purposes does not seem to facilitate the obtainment of charitable status. Journalism is not a typical charitable purpose

by itself, which means that not-for-profit media seeking charitable purpose—when this is possible—must qualify within other existing purposes, such as education or religion. This specificity of well accepted purposes is particularly important in the Revenue Commissioners’ case-by-case approach to applications for tax exemption on the basis of charitable status that creates a degree of inconsistency in the awarding of charity tax status.

A second legal obstacle to obtaining tax exempt status resides in the outdated approach of tax authorities to the not-for-profit sector. For example, in the UK and the US, the national reports underlined the lack of consideration for the recognition of the public benefit generated by journalistic activities as such, which could provide a more straightforward perspective to analyze tax-exemption requests. In the UK, it can be difficult for a news organization to get charitable status because of the legal framework that requires charities to have charitable purpose(s) that fit within the charitable descriptions in the Charities Act 2011 and to show the public benefit of this purpose. There are also over-burdensome registration demands and process for applicants in place. In the Canadian case, the limitations inherent to the requirements to become a charity appear to constrain development of the sector at the federal level.

A third reason why tax authorities might delay decisions on the tax-exempt requests filed by media organizations is also explained by their skepticism not only regarding their charitable purpose but also the existence of past scandals in the not-for-profit media sector (in Ireland, see country report) and their connection with influential for-profits (in the US, see country report).

### **Tax deductible gifts**

In general, charities and not-for-profit organizations may receive tax deductible gifts. In Australia, a separate registration is necessary to allow organizations to be qualified as deductible gift recipients. For example, while a number of not-for-profit media organizations (e.g. *The Catholic Weekly*, *The Record*, and *The Epoch Times*) have been recognized as charities—and are thus exempt from the payment of income tax—they have not been qualified as deductible gift recipients. Income tax deductibility in Australia is available only for gifts or donations to charities and other organizations which have been accorded deductible gift recipient (DGR) status by the Australian Tax Office (ATO) or in the Income Tax Act. The absence of this status has become an obstacle to the development of some not-for-profit media organizations in Australia. In Canada, the DGR status requires full charity status. Canadian not-for-profit organizations which are not qualified as charities, may be tax-exempt but cannot issue receipts for tax deductions or credits in exchange for donations. For-profit companies would then be able to deduct sponsorships given to not-for-profit organization not as deductible gifts but rather as expenses made for the purpose of incurring income.

Not-for-profit media outlets which are not allowed to receive tax deductible gifts might find other funding mechanisms such as grants or connections with for-profit organizations. In Ireland, the 2003 Broadcasting Funding Act created a

contestable fund for broadcast production known as the Sound and Vision fund which allows *all* broadcasters on the island of Ireland to bid for funds to produce public service content. This cannot be regarded as a gift, but might be regarded as a grant since it is non-market funding. In the UK, non-charitable journalism-producing organizations and individuals can receive some support from charities and charitable individuals, however the tax situation for the recipient depends on the recipient's circumstances. In the US, different corporate structures have been created to support directly or indirectly not-for-profit media journalism. This has been the case of media hybrids or low-profit limited liability corporations, and for-profit media outlets with affiliated not-for-profit investigative funds.

### Existence and Position of Not-for-profit Media Organizations

There is insufficient empirical data to draw any conclusions on the exact position of not-for-profit media organizations. In Australia, Canada, Ireland, the UK and the US, not-for-profit media organizations tend to be small scale and focused on serving specific local areas. In Ireland, the not-for-profit media sector refers mainly to a small number of charitable/tax exempt news organizations which tend to be religious in nature. In Canada, Australia, and in the US, not-for-profit media organizations are also small and local outlets that serve specific communities. In the UK, there are very few examples of charities running journalism and news services as part of their central activities, but there are also examples of small not-for-profit media organizations. Notwithstanding the fact that news organizations such as *The Irish Times* are contemplating charity/foundation status, most news media are not comfortable with the idea that the newspaper receives charitable status or be associated with such a status.

To conclude, the number of not-for-profit media organizations is growing. Not-for-profit media organizations can apply for a tax-exempt or charitable status but they often face the objection that journalism is not per se a typical charitable purpose. In addition, the qualification of a media organization as tax exempt implies a great deal of discretion and legislators and tax authorities have not done much to accommodate the specific features of the industry. Moreover, until now there have not been any successful initiatives to codify journalism as a charitable purpose or case-law solving the existing doubts regarding the not-for-profit nature of this activity. Although legislative changes might be unlikely to occur in the coming years, this could potentially reduce the delays in the approval of tax-exempt requests and facilitate the emergence and survival of not-for-profit media organizations, including those that conduct investigative journalism.





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